Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

IN RE: WILLIAM A. TOTO

ON PETITION FOR WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED FOR REVIEW

In this diversity case, Nemesis Veritas and its principals sued Mr. Toto for tortious interference with contract, seeking $90 million in damages. The District Court eventually entered summary judgment for Mr. Toto on the merits and dismissed the claim. The U.S. Eleventh Circuit Court of Appeals affirmed.

The District Court also held, as a matter of first impression, that the Florida offer of judgment statute applied to the case, despite the fact that the cause of action was governed by the law of another State. Since Mr. Toto had made a qualifying, good faith offer of judgment under the statute, which the plaintiffs had failed to accept, the District Court held that Mr. Toto was entitled to fees and awarded him in excess of $260,000.

The appellate proceedings regarding the fee issue were lengthy and involved. The Eleventh Circuit initially vacated the fee award, deeming that Virginia and not Florida law governed the fee issue, and denied en banc review. Then, however, on the basis of new Florida decisional law, the Eleventh Circuit re-visited the issue, vacated its initial decision and upheld the great bulk of the award. As prevailing party, Mr. Toto then timely petitioned the Eleventh Circuit for an award of his appellate fees. These, by then, exceeded $100,000.

Under Florida law, Mr. Toto was entitled to appellate fees and the court had no discretion to refuse them. The Eleventh Circuit, however, refused to award Mr. Toto any appellate fees. It gave no explanation for its action. Mr. Toto then moved for reconsideration. The Eleventh Circuit denied the motion, again completely without explanation.

These facts present the following question:

Does the Eleventh Circuit's refusal to follow the governing State law and award appellate fees and expenses in this diversity case appear to constitute such usurpation of judicial power or clear abuse of discretion that this Court should exercise its supervisory power via mandamus and require the Eleventh Circuit to supply an explanation for its decision or, in default of such, enter an award of appellate fees and expenses?

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals affirming judgment on the merits and reversing the grant of attorney's fees at the trial level is reported at 256 F.3d 1120 (11th Cir. 2001). (App., *infra*, 23a). The opinion of the Eleventh Circuit vacating its denial of attorney's fees at the trial level and affirming the bulk of the award is reported at 311 F.3d 1077 (11th Cir. 2002). (App., *infra*, 7a). The Eleventh Circuit's order denying the petition for appellate fees and costs of February 4, 2003 is unpublished. (App., *infra*, 3a). The Eleventh Circuit's order denying the motion for reconsideration and for partial recall of the mandate dated March 28, 2002 [sic] (in fact, 2003) is unpublished. (App., *infra*, 1a).

ADDITIONAL MATERIALS

The September 24, 2002 unpublished order of the Florida Supreme Court in the *BDO Seidman* case, awarding fees in regard to resisting certiorari, is reproduced at App., *infra*, 183a. The October 31, 2001 unpublished order of Florida's Fourth District Court of Appeal in *BDO Seidman*, directing the assessment of appellate fees by the trial court, is reproduced at App., *infra*, 181a. Mr. Toto's November 18, 2002 petition for appellate fees and costs in this case is reproduced at App., *infra*, 95a.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is predicated on the All Writs Act, 28 U.S.C. § 1651 (a), which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATUTORY PROVISIONS INVOLVED

Fla. Stat. § 59.46 is reproduced at App., *infra*, 94a.
Fla. Stat. § 768.79 is reproduced at App., *infra*, 90a.

STATEMENT OF THE CASE

This was a diversity case under 28 U.S.C. § 1332. On May 6, 1996, Nemesis Veritas and its principal, D. Bruce McMahan, sued Mr. Toto for malicious prosecution and tortious interference with contract. The plaintiffs sought $30 million in compensatory damages and $60 million in punitive damages, for a total of $90 million.

On August 27, 1998, Mr. Toto filed his first motion for summary judgment. He claimed that the malicious prosecution claim was legally untenable and that the tortious interference claim was barred by collateral estoppel. On March 29, 1999, the District Court granted summary judgment on the malicious prosecution claim but denied the motion as to the tortious interference claim. Mr. Toto renewed his motion regarding collateral estoppel on the remaining claim and it was denied for a second time on October 29, 1999. Mr. Toto then filed a third motion for summary judgment and, as the Eleventh Circuit later observed: "on December 21, 1999, although nothing changed, the district court granted summary

judgment . . . ." *McMahan v. Toto*, 256 F.3d 1120, 1130-35 (11th Cir. 2001).

Earlier that year, on May 11, 1999, Mr. Toto had served the plaintiffs with an offer of judgment for $100 pursuant to Florida's offer of judgment statute which provides, in pertinent part, that:

> In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by plaintiff within 30 days, the defendant shall be entitled to recover reasonable attorney's fees incurred by him or her on the defendant's behalf . . . if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer . . . .

Fla. Stat. § 768.79. (App., *infra*, 90a).

Following the District Court's dismissal of the $90 million tortious interference claim on December 21, 1999, Mr. Toto moved the District Court for his attorney's fees under Fla. Stat. § 768.79. He argued that, even though the tortious interference claim had been governed by Virginia law, the Florida statute nevertheless applied to the case, being a Florida "rule of judicial administration." At the time, there were no Florida cases directly on point and this was a matter of first impression. The District Court ruled that the Florida statute did apply and that Mr. Toto had made a qualifying offer which entitled him to an award of attorney's fees. The court then entered an award in Mr. Toto's favor for $260,034.29.

On July 10, 2001, the Eleventh Circuit affirmed the District Court's ruling as to collateral estoppel of the tortious interference claim, finally disposing of that issue. *McMahan v. Toto*, 256 F.3d 1120, 1130-35 (11th Cir. 2001). (App., *infra*, 23a).

The fee issue, however, was not so easily resolved. The Eleventh Circuit made what it would later characterize as an "Erie guess"[1] as to what the Florida Supreme Court would do in like circumstances and concluded that Virginia law and not Florida law governed the offer of judgment issue. It therefore vacated the fee award. *McMahan v. Toto*, 256 F.3d 1120, 1130-35 (11th Cir. 2001). Mr. Toto's petition for en banc review of this ruling was denied on October 31, 2001.

The very day that the Eleventh Circuit denied Mr. Toto's petition for en banc review, however, Florida's Fourth District Court of Appeal issued an opinion holding that Fla. Stat. § 768.79 does, indeed, apply in all civil actions for damages brought in Florida, even where the substantive law of another jurisdiction governs the cause of action. *See BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So.2d 366 (Fla. 4th DCA 2001), review denied, 828 So.2d 384, 2002 Fla. LEXIS 2048 (Sept. 24, 2002). In its opinion in *BDO Seidman*, the Fourth District Court of Appeals explicitly stated that the Eleventh Circuit's July 10, 2001 opinion in this case was an incorrect statement of Florida law. *See BDO Seidman*, 802 So.2d at 370. Decisions of the District Courts of Appeal represent the law of Florida unless and until they are overruled by the Florida Supreme Court. *See Pardo v. Florida*, 596 So.2d 665, 666 (Fla. 1992). Therefore, *BDO Seidman* now constituted the law of Florida.

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[1] See *McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002).

Given this change in the decisional law of the State, and given that the mandate had not yet issued in the Eleventh Circuit, Mr. Toto again moved for rehearing, this time under the authority of *Huddleston v. Dwyer*, 322 U.S. 232 (1944).

The Eleventh Circuit waited to see if the Florida Supreme Court would review *BDO Seidman*, before making a decision. After the Florida Supreme Court declined to review *BDO Seidman* in September 2002, the Eleventh Circuit issued a new opinion on the fee issue on November 6, 2002, stating:

> The case is still before us and we can correct our missed guess about Florida law. In light of the *BDO Seidman* decision, we rescind [the pertinent part of] our prior decision . . . and in its place we hold that Florida's offer of judgment statute, Fla. Stat. § 768.79 is applicable to cases, like this one, that are tried in the State of Florida even though the substantive law that governs the case is that of another state.

McMahan v. Toto, 311 F.3d 1077, 1081 (11th Cir. 2002). (App., *infra*, 7a).

The Eleventh Circuit then proceeded to deal with such objections raised by Nemesis Veritas as it considered meritorious,[2] held the offer of judgment to

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[2] "Many of these born-again contentions are not sufficiently viable to warrant discussion because they are either so clearly without merit, or they are without merit and are of insufficiently general application, to warrant discussion in a published opinion." *McMahan v. Toto*, 311 F.3d 1077, 1081 (11th Cir. 2002). (App., *infra*, 7a).

have been valid and made in good faith,[3] and affirmed the bulk of the fee award.[4]

Having prevailed on the merits of the $90 million claim and now, finally, having prevailed on the issue of his entitlement to fees, Mr. Toto was the overall prevailing party.[5] Given that the Eleventh Circuit had confirmed that he had made a qualifying, good faith offer of judgment and was entitled to his trial court fees, Mr. Toto had a clear legal entitlement, under the Florida law pertaining to Fla. Stat. § 768.79, to an award of reasonable appellate fees, as well, which the court had no power or discretion to deny.[6]

On November 18, 2002, Mr. Toto timely filed a petition for his appellate fees and expenses, together with a bill of fees and costs verified by record counsel and an affidavit from an expert witness. (App., *infra*, 95a). On the basis of these materials, Mr. Toto suggested that a reasonable appellate fee would be $103,901.14. (App., *infra*, 98a).

On February 4, 2003, the Eleventh Circuit denied the petition outright, refusing any award of fees whatsoever, without any explanation, stating merely: "This appeal is

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[3] *McMahan v. Toto*, 311 F.3d 1077, 1083-84 (11th Cir. 2002). (App., *infra*, 7a).

[4] The Eleventh Circuit reduced the award by $6,018.75 for an arithmetical error and directed that the case be remanded to the District Court for some further "fine-tuning," to exclude such fees as had been attributable to briefing the *amount* of (as opposed to *entitlement* to) an award in the District Court, which fees were not deemed compensable under Florida law. *See McMahan v. Toto*, 311 F.3d 1077, 1086 (11th Cir. 2002). (App., *infra*, 7a).

[5] Mr. Toto failed to prevail on two subordinate issues in the appeals. This was as to the District Court's denial of fees under the alternative bases of Fla. Stat. § 57.105 and 28 U.S.C. § 1927.

[6] See Fla. Stat. § 59.46 and cases cited at pp. 8-10, *infra*.

over." Contrary to the usual practice of allowing time for a motion for reconsideration, [See Fed.R.App.P. 40 and 41] the Eleventh Circuit directed the immediate issuance of the mandate, thereby divesting itself of further jurisdiction. (App., *infra*, 5a).

On February 25, 2003, Mr. Toto moved for reconsideration of the denial of fees and for partial recall of the mandate. He pointed out that under Florida law a prevailing party who has served a qualifying, good faith offer under Fla. Stat. § 768.79 has a legal entitlement to appellate fees, which the Eleventh Circuit had no power or discretion to refuse. On March 28, 2003, the Eleventh Circuit denied the motion, again without explanation. (App., *infra*, 1a).

In default of any explanation, the Eleventh Circuit's action appears to have been a clear abuse of discretion. Your Petitioner therefore seeks a writ of mandamus directing the panel of the Eleventh Circuit which issued the opinion disposing of Mr. Toto's entitlement to fees to give some sufficient reason for its action or enter an award of reasonable appellate attorney's fees and expenses.

The members of the panel in question were the Honorable E. Carnes and the Honorable S. Marcus, judges of the United States Court of Appeals for the Eleventh Circuit, and the Honorable William B. Hand, United States District Judge for the Southern District of Alabama, sitting by designation.

REASONS FOR GRANTING THE PETITION

(a) The Eleventh Circuit's denial of appellate fees appears, on its face, to have been a clear abuse of discretion:

In its ruling of November 6, 2002, the Eleventh Circuit recognized that *BDO Seidman* represented the law in Florida and that it was bound to follow that decision.[7] The court therefore affirmed Mr. Toto's entitlement to trial court fees, vacating its own earlier opinion to the contrary.[8]

Florida's Supreme Court has made it clear that once a litigant has demonstrated the prerequisites for the recovery of fees under Fla. Stat. § 768.79, an award of fees is a matter of legal *entitlement* which the court has no discretion to refuse,[9] absent an explicit finding of

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[7] "If the BDO Seidman decision had been around when we issued our first decision in this case we would have followed it. We would have been compelled to do so because the rule is that, absent a decision from the state supreme court on an issue of state law, we are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently . . . That rule is, if anything, particularly appropriate in Florida, where the state's highest court has held that 'the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court]. *Pardo v. Florida*, 596 So.2d 665, 666 (Fla. 1992).'" *See McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002); since followed by the Eleventh Circuit in *Raie v. Cheminova, Inc.*, 2003 Fla. App. LEXIS 13691 (July 8, 2003) and *Buse v. Kuechenberg*, 325 F.3d 1249, 1251 (11th Cir. 2003).

[8] That the analysis in *BDO Seidman* is a correct expression of Florida law, is, incidentally, buttressed by the fact that *BDO Seidman* has since been followed by Florida's Fifth District Court of Appeal in *Bennett v. Morales*, 845 So.2d 1002 (Fla. 5th DCA 2003), review denied, 2003 Fla. App. LEXIS 9738 (May 27, 2003).

[9] "To begin, the words 'shall be entitled' . . . in subsection (1) [of Fla. Stat. § 768.79] . . . cannot possibly have any meaning other than to

"bad faith."[10] In the present case, the Eleventh Circuit found that all these criteria were satisfied. It found the offer to have been facially valid and effective and scathingly termed Nemesis Veritas' claim of bad faith to be "illogical and, thus unreasonable." *See McMahan v. Toto*, 311 F.3d 1077, 1083-84 (11th Cir. 2002).

In *TGI Friday's Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995), the Florida Supreme Court concluded that once a court had determined that the existence of a good faith, qualifying offer, the only discretion remaining was to determine what would be, in all the circumstances, a reasonable amount to award. There is no power or discretion at that point to deny fees.[11]

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create a right to attorney's fees when the two preceding prerequisites have been fulfilled: i.e., (1) when a party has served a demand or offer for judgment, and (2) that party has recovered a judgment at least 25 percent more or less than the demand or offer. These are the only requirements of the statutory entitlement. *No other factor is relevant in determining the question of entitlement." See TGI Friday's Inc. v. Dvorak*, 663 So.2d 606, 611 (Fla. 1995) (emphasis added).

[10] "Subsection (7)(a) [of Fla. Stat. § 768.79] provides that: '(a) if a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.' This provision does indeed allow the court in its discretion to disallow an award of attorney's fees, but only if it determines that the qualifying offer 'was not made in good faith.' *That is the sole basis on which the court can disallow an entitlement to an award of fees." TGI Friday's Inc. v. Dvorak*, 663 So.2d 606, 612 (Fla. 1995) (emphasis added).

[11] "Under this statute, *the legislature did not give judges the discretion to determine whether it is reasonable to entitle qualifying [litigants] to fees.* Rather, it determined for itself that it is reasonable to entitle every offeror who makes a good faith offer (later rejected) 25 percent more or less than the judgment finally entered to an award of fees. Under subsection (7)(b), *the court's discretion is directed by the statutory text solely to determining the reasonability [sic] of the amount of fees awarded . . . ." TGI*

It is clear that this entitlement extends to fees on appeal. By Florida statute: "any provision of a statute . . . providing for the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees to the prevailing party on appeal." *See* Fla. Stat. § 59.46. All five of Florida's District Courts of Appeal have held that a litigant who has made a qualifying, good faith offer under Fla. Stat. § 768.79, is also entitled to his fees on appeal. *See Motter Roofing Inc. v. Leibowitz*, 833 So.2d (Fla. 3d DCA 2002) (citing *Lantigua v. Lopes*, 696 So.2d 532 (Fla. 3d DCA 1997)); *Hartley v. Guetzloe*, 712 So.2d 817 (Fla. 5th DCA 1998); *Mark C. Arnold Constr. Co. v. Nat'l Lumber Brokers, Inc.*, 642 So.2d 576 (Fla. 1st DCA 1994); *Westfield Ins. Co. v. Mendolera*, 647 So.2d 223 (Fla. 2d DCA 1993); *Schmidt v. Fortner*, 629 So.2d 1036 (Fla. 4th DCA 1993); *Williams v. Brochu*, 578 So.2d 491 (Fla. 5th DCA 1991). As the Eleventh Circuit itself observed in its November 6, 2002 opinion in this case, such District Court decisions represent the law in Florida. *See McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002) [citing *Pardo v. Florida*, 596 So.2d 665, 666 (Fla. 1992)].

At the point when Mr. Toto moved for an award of appellate fees, the Eleventh Circuit had affirmed judgment on the merits in his favor, disposing of damages claims of $90 million. The Eleventh Circuit had also, finally, affirmed the District Court's ruling that he had made a qualifying, good faith offer and was entitled to fees, and it had affirmed the great bulk of the trial court fees awarded by the District Court. Under Florida law, a party who prevails on appeal on the

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Friday's Inc. v. Dvorak, 663 So.2d 606, 613 (Fla. 1995) (Emphasis added).

significant issues is deemed a prevailing party.[12] It is indisputable that Mr. Toto was the prevailing party in the appellate proceedings.

It follows that, having determined Mr. Toto to be entitled to fees in the trial court under Fla. Stat. § 768.79, the Eleventh Circuit was obliged to enter an award of appellate fees in the event that Mr. Toto filed a timely fee petition.[13] Mr. Toto did so. He filed his fee petition and all supporting papers on November 16, 2002, twelve days after the Court's opinion of November 6, 2002 and within the fourteen days allowed by the rules. *See* Fed.R.App.P. 39(d)(1).[14]

It appears, therefore, that on its face, the Eleventh Circuit's refusal to award fees was a clear abuse of discretion.

(b) There is no apparent justification for the Eleventh Circuit's decision:

The panel in question consists of able and learned judges and it may be that, if asked, they would be able to articulate a good and sufficient legal reason for their

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[12] Florida adopted the "significant issues" test of *Hensley v. Eckerhart*, 461 U.S. 424 (1983) in *Moritz v. Hoyt Enterprises, Inc.*, 604 So.2d 807 (Fla. 1992).

[13] Such a request for appellate fees would routinely be granted in Florida's State courts. Thus, in the *BDO Seidman* case, on September 24, 2002, the Florida Supreme Court awarded BDO Seidman fees for its counsel's services in resisting certiorari and, on October 31, 2001, Florida's Fourth District Court of Appeal entered an order directing the assessment of appellate fees by the trial court (App., *infra*, 181a) and (App., *infra*, 183a).

[14] There are, strictly, no rules which limit the time for filing fee applications. Eleventh Circuit practice is to construe such applications as being governed by the fourteen day "costs" time limit of Fed.R.App.P. 39(d)(1).

decision to refuse all appellate fees. They did not, however, give any reason and we are unable to find one. Plainly, the petition was timely. Plainly, too, it was well supported. (App., *infra*, 95a). From that point on, we can only guess.

(1) "Prevailing Party"

We could guess, perhaps, that the Eleventh Circuit somehow deemed Mr. Toto not to be a "prevailing party" for the purpose of appellate fees. Such a view, however, could only be predicated on the fact that Mr. Toto did not prevail on *every* issue in the case, regardless of the importance of what he won and what he lost. The Circuit Court did, it is true, make a minor correction to the award and remand for a further minor deduction.[15] The Circuit Court also affirmed the District Court's denial of fees under two subordinate, alternative arguments which Mr. Toto raised, under Fla. Stat. § 57.105 and 28 U.S.C. § 1927. For a number of reasons, though, this could hardly have justified deeming Mr. Toto anything other than the "prevailing party." First, and most importantly, he defeated Nemesis Veritas on the merits of its lawsuit to recover massive damages of $90 million against him. Second, after a lengthy battle in the trial and appellate courts, he won his entitlement to fees under Fla. Stat. § 768.79 and secured appellate affirmation as to the great bulk of the fees awarded by the District Court. This ruling rendered his "second string" arguments for fees under Fla. Stat. § 57.105 and 28 U.S.C. § 1927, largely superfluous and of little importance. (Had he won on either or both of these arguments, too, of course, he would still not have been

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[15] The amount that the District Court will deduct is not yet known, but since it relates only to the amount of post-summary judgment briefing in the District Court concerning the amount of fees to be awarded, it cannot be a large in relation to the total award.

entitled to more than one set of fees). The end result of the appeals could therefore hardly be regarded in any way as a "draw." This was, clearly, a victory for Mr. Toto and a defeat for Nemesis Veritas. Under Florida law, as noted above, having prevailed on the significant issues, Mr. Toto was the prevailing party and entitled to appellate fees. *See Moritz v. Hoyt Enterprises, Inc.*, 604 So.2d 807, 809-10 (Fla. 1992).

(2) Fed.R.App.P. 39(a)(4).

We could otherwise guess, perhaps, that the Eleventh Circuit considered that it had a discretion to deny fees under Fed.R.App.P. 39(a)(4). ("if a judgment is affirmed in part, reversed in part, modified or vacated, costs are taxed only as the court orders.") This rule gives the Circuit Court discretion as to the imposition and allocation of appellate costs in the case of "mixed results." *See Golden Door Jewelry Creations. Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1340 (11th Cir. 1997). As noted above, even though Mr. Toto prevailed on all the major issues, he failed to prevail on subordinate issues, thus rendering the final result, technically, a "mixed" one as regards the allocation of costs within the meaning of this rule.

If, however, the Eleventh Circuit relied on Fed.R.App.P. 39(a)(4) for its decision, it would have been incorrect. First, the rule deals with "costs" and not "fees:" items of expense which are clearly distinguishable from each other. To attempt to warp a discretion as to "costs" under Fed.R.App.P. 39(a)(4) rule into a discretion as to "fees," would stretch the rule beyond the breaking point. Second, even if one were to assume that the costs rule extended to fees, too, the discretion so conferred must surely yield, in a diversity case, to a State rule of law, such as under Fla. Stat. §

768.79, which mandates an award. To hold that a federal rule of procedure confers a discretion on a federal court to deny an entitlement guaranteed by the governing State law, would run directly counter to the basic precepts of the *Erie* doctrine.

(3) "Equity"

Our only other guess is that the court did not state a reason for its decision because it was unable to do so and that it dismissed the application for appellate fees because it decided that it would be, in some loose sense, "inequitable" to award further fees in a case that should have been disposed of in its infancy and had been far-too-long fought. This is a conclusion that we are loath to reach, but it is a possibility that we must address.

As noted above, Mr. Toto moved three times for summary judgment on the ground of collateral estoppel between mid-1998 and the end of 1999. He suffered two denials before his motion was finally granted even though, as the Eleventh Circuit acknowledged, in affirming the District Court, "nothing changed" in the interim. *See McMahan v. Toto*, 256 F.3d 1120, 1130-35 (11th Cir. 2001). The failure to grant the collateral estoppel motion when it was first raised led to years of unnecessary litigation and hundreds of thousands of dollars in wasted fees.

As it was, after this $90 million threat had been pending against Mr. Toto for nearly three years in the District Court, and had been disposed of by summary judgment only on the literal eve of trial, the case went on appeal before the Eleventh Circuit for another three years. There, it had an extensive and involved history of petitions, motions and briefs - many more than are directly relevant to the issues addressed here. After

briefing, oral argument, a petition for rehearing and an unusual *second* petition for rehearing, the Eleventh Circuit, in the end, vacated its lengthy, reasoned, initial opinion, to which it had clearly devoted great time and thought, reversed itself on its "missed guess about Florida law" regarding the application of Fla. Stat. § 768.79, and awarded Mr. Toto his trial court fees. *See McMahan v. Toto*, 311 F.3d 1077, 1081 (11th Cir. 2002). Against this backdrop, the arrival of Mr. Toto's petition for appellate attorney's fees, kicking off a possible fourth year of appellate judicial endeavor, can hardly have been met with much enthusiasm on the part of the Eleventh Circuit.

Eleventh Circuit Rules allow the summary affirmance of decisions of District Courts where they are not clearly erroneous and an opinion would have no precedential value. See 11th Cir.R. 36-1. All other decisions should, at least by implication, state some reason for the court's action. Consequently, in its initial decision reversing the District Court, the Eleventh Circuit explained its decision in detail. Similarly, in its subsequent opinion, re-instating the bulk of the award, the Eleventh Circuit wrote in further detail to justify its decision.

We would ordinarily, therefore, have expected that the Eleventh Circuit would have stated some reason, however briefly, for its disposition of the petition for appellate fees. The amount requested was substantial, over $100,000, and the legal reasons supporting the petition were cogent. The question of whether or not to allow appellate fees was a serious one in terms of the jurisprudence, since it involved a matter of first impression regarding the interplay of State and federal power in the context of the *Erie* doctrine. The laconic order that issued, however, stated no reason

whatsoever, factual or legal. It contained the pointed remark that: "This appeal is over," and was coupled with a direction for immediate issuance of the mandate, thus divesting the Court of jurisdiction. (App., *infra*, 3a) (This is contrary to the usual practice where mandate does not issue until seven days after the time for filing a petition for rehearing has expired: a total of twenty-one days. See Fed.R.App.P. 40 and 41). The second order, denying reconsideration and partial recall of the mandate was even briefer and still offered no explanation. (App., *infra*, 1a).

The Eleventh Circuit must be well aware of the fact that such summary dispositions are much harder to appeal, since every possible reason for a correct ruling will be indulged by the reviewing court. All of this taken together, unfortunately, could indicate mere, simple exasperation and a desire to be done with the case rather than a considered decision reached on an analysis of the law.

We entertain this possibility only with reluctance. However, the long and the short of it is that in the absence of any explanation, we can only guess why the court did as it did. We are, therefore, forced to conclude that the decision to disallow fees was contrary to the governing Florida law; contrary to the federal precepts which mandate the application of state law in diversity cases; and, consequently, constituted a usurpation of power and a clear abuse of discretion. This has resulted in the denial of a substantial legal right to Mr. Toto for which he has no avenue for relief other than via a writ of mandamus.

(c) This abuse of discretion may, and should, properly be corrected by Mandamus:

Mandamus is an extraordinary remedy and is sparingly granted. We respectfully suggest, however, that it is appropriate to the facts of this case.

The traditional use of the writ of mandamus has been " . . . to confine an inferior court to a lawful exercise of its prescribed jurisdiction . . . ." *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943). See also *Mallard v. United States District Court for Southern District of Iowa*, 490 U.S. 296 (1989); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). Stated differently, but to essentially the same effect, mandamus lies to correct the "usurpation of judicial power" or to remedy a "clear abuse of discretion." See, e.g., *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953). In sum, mandamus lies to relieve a litigant of the consequences of action on the part of a lower federal court that was in excess of its legitimate power and beyond the ambit of any discretion that it may possess. We suggest that we have shown just such a clear abuse of power or breach of discretion on the part of the Eleventh Circuit and that this element for the issuance of mandamus is satisfied.

The writ of mandamus may, moreover, properly issue to compel compliance by a lower federal court with court rules which it is this Court's obligation to formulate and enforce. *See e.g., Los Angeles Brush Mfg. Co. v. James*, 272 U.S. 701 (1927); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). When there is a substantial allegation of "usurpation of power" under a federal rule and it is a question of first impression, the opportunity to provide a correct formulation of

"necessary guidelines" in order "to settle new and important problems" should also weigh in favor of review by mandamus. *See Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964). We suggest that the Eleventh Circuit may have believed that it had a power and a discretion to deny fees under Fed.R.App.P. 39(a)(4). No reported cases we have found discuss the interplay of that federal rule with State law, in a diversity case, where that State law mandates an entitlement to appellate fees and expenses. It does not appear to us that any discretion as to costs under that rule could, however, conceivably "trump" a mandate to fees under an applicable State law. The correct decision on this issue is likely to be of general importance to the bench and bar in Florida, given the application of Florida's offer of judgment statute in all diversity actions for damages brought in federal courts located in Florida. For this reason, too, mandamus should lie.

The further requirement for the issuance of mandamus, that there be no other adequate remedy is also met here. Eleventh Circuit authority provides that the Circuit Court has sole authority to determine appellate attorney's fees and costs. *See Davidson v. City of Avon Park*, 848 F.2d 172 (11th Cir. 1988). Mr. Toto has petitioned that court for fees, been denied, moved for rehearing, and been denied. He has exhausted all possibilities for relief in that court. The action has now been remanded to the District Court to make the adjustment ordered by the Circuit Court. The District Court is, however, completely without power to award appellate fees and expenses, and Mr. Toto has no avenue of relied there. *See Davidson*, 848 F.2d at 173-74. That leaves only an application to this Court, essentially for certiorari. Relief by certiorari, however, is extremely tightly circumscribed and only a tiny fraction of petitions for such are granted. Still, had the

Eleventh Circuit given some reason for its action, we may have been able to draw such a petition. As it is, given that decisions of the Circuit Courts arrive in this Court clothed with a presumption of correctness, the fact that the Eleventh Circuit failed to state any legal or factual reason whatsoever for its decision, rendered any real prospect of this Court granting certiorari, illusory.

We have attempted to address every reason which may have underlain the Eleventh Circuit's action. There is no guarantee, even so, however, that we have anticipated every possible reason which may occur to this Court, and neither we nor this Court can know the actual reasons for the Eleventh Circuit's decision. Issuance of a writ of mandamus would give the judges of the panel in question an opportunity to justify their decision, would elucidate the basis on which they acted, and would, thus, be in aid of this Court's appellate jurisdiction.

Conclusion

Your petitioner, Mr. Toto, therefore respectfully requests that this Honorable Court issue a writ of mandamus to the United States Court of Appeals for the Eleventh Circuit, and specifically to the Honorable E. Carnes and the Honorable S. Marcus, judges of the United States Court of Appeals for the Eleventh Circuit, and the Honorable William B. Hand, United States District Judge for the Southern District of Alabama, sitting as a member of the United States Court of Appeals for the Eleventh Circuit by designation, directing them to provide a clear and complete explanation as to their reasons for entry of the order in question, or, in the alternative, that they enter an award of appellate attorney's fees and expenses in favor of Mr. Toto.

Dated: July __, 2003

Respectfully submitted:

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Attorneys for Petitioner

(Any footnotes trail end of each document)

00-10323-FF & 00-14729-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D. BRUCE MCMAHAN, NEMESIS VERITAS,
f.k.a. McMahan & Company,
Plaintiff-Appellants/Cross-Appellees,

versus

William A. Toto,
Defendant-Appellee/Cross-Appellant.

Filed: March 28, 2002

On Appeal from the United States District
Court for the Southern District of FIorida

BEFORE: CARNES and MARCUS, Circuit Judges, and HAND fn1, District Judge.

BY THE COURT:

Appellee's motion to recall the mandate is DENIED AS UNNECESSARY.

Appellee's motion for reconsideration is DENIED.

OPINION:

SUGGESTION FOR REHEARING EN BANC DENIED

Footnote

fn1 The Honorable William B. Hand, US. District Judge for the Southern District of Alabama, sitting by designation.

00-10323-FF & 00-14729-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D. BRUCE MCMAHAN, NEMESIS VERITAS,
f.k.a. McMahan & Company,
Plaintiff-Appellants/Cross-Appellees,

versus

William A. Toto,
Defendant-Appellee/Cross-Appellant.

Filed February 4, 2003

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: CARNES and MARCUS, Circuit Judges, and HAND fn1, District Judge.-

BY THE COURT:

Appellee's "Petition for Appellate Fees and Costs...," construed as a petition for attorney's fees and litigation expenses, or in the alternative as a motion to find Appellee entitled to the same and to remand to district court to determine the amount to be awarded, is before the Court.

The motion for litigation expenses is DENIED.

The alternative motion to find Appellee entitled to attorney's fees is DENIED.

The alternative motion for remand is DENIED. This appeal is over.

Footnote

fn1 The Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

No. 00-10323
D.C. Docket No. 96-08294-CV-DMM

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D. BRUCE MCMAHAN, NEMESIS VERITAS,
f.k.a. McMahan & Company,
Plaintiff-Appellants,

versus

William A. Toto,
Defendant-Appellee.

No. 00-14728
D.C. Docket No. 96-08294-CV-DMM

D. BRUCE MCMAHAN, NEMESIS VERITAS,
f.k.a. McMahan & Company,
Plaintiff-Appellants-Cross-Appellees,

versus

William A. Toto,
Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of the Court.

Entered: November 6, 2002
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

ISSUED AS MANDATE
FEB 04 2003
U.S. COURT OF APPEALS
ATLANTA, GA.

No. 00-10323, No. 00-14728

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D. BRUCE MCMAHAN, NEMESIS VERITAS,
f.k.a., Mcmahan & Company,
Plaintiffs-Appellants,

versus

WILLIAM A. TOTO,
Defendant-Appellee.

D. BRUCE MCMAHAN, NEMESIS VERITAS,
f.k.a. Mcmahan & Company,
Plaintiffs-Appellants-Cross-Appellees,

versus

WILLIAM A. TOTO,
Defendant-Appellee-Cross-Appellant.

November 6, 2002, Decided

COUNSEL: For D. Bruce McMahan, Nemesis Veritas, Appellants (00-10323): Patti E. Evans, New York, NY. Leigh R. Isaacs, New York, NY.

For D. Bruce McMahan, Appellant (00-14728): Patti E. Evans, Isaacs & Evans, LLP, New York, NY.

For Nemesis Veritas, Appellant (00-14728): Patti E. Evans, Leigh R. Isaacs, Isaacs & Evans, LLP, New York, NY.

For William A. Toto, Appellee (00-10323, 00-14728):

Hendrik G. Milne, Aballi, Milne, Kalil & Garrigo, P.A., Miami, FL.

JUDGES: Before CARNES and MARCUS, Circuit Judges, and HAND *, District Judge.

OPINION BY: CARNES

OPINION: ON PETITION FOR REHEARING

Before CARNES and MARCUS, Circuit Judges, and HAND *, District Judge.

CARNES, Circuit Judge:

Recent events in this case illustrate that "when we write to a state law issue, we write in faint and disappearing ink." Sultenfuss v. Snow, 35 F.3d 1494, 1504 (11th Cir. 1994) (en banc) (Carnes, J., dissenting). The disappearing ink here is that which we used in our previous opinion in this case to express our holding about whether the Florida Supreme Court would apply its offer of judgment statute, Fla. Stat. § 768.79, in a case tried in Florida but for which the substantive law of another state governed. There were no Florida decisions on point, and we made an Erie guess that the Florida Supreme Court would not apply the statute in those circumstances. As a result, we reversed the part of the district court's judgment awarding attorney's fees under the statute. McMahan v. Toto, 256 F.3d 1120, 1130-35 (11th Cir. 2001).

I. THE APPLICABILITY OF THE OFFER OF JUDGMENT STATUTE

Our earlier opinion was barely in the hardback books when the Fourth District Court of Appeal in Florida

issued a decision disagreeing with our estimate of Florida law. See BDO Seidman, LLP v. British Car Auctions, Inc., 802 So. 2d 366 (Fla. 4th DCA 2001), review denied, 828 So. 2d 384, 2002 Fla. LEXIS 2048 (Fla. Sept. 24, 2002). If the BDO Seidman decision had been around when we issued our first decision in this case, we would have followed it. We would have been compelled to do so because the rule is that, absent a decision from the state supreme court on an issue of state law, we are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently. See Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 775 (11th Cir. 2000); Trumpet Vine Invs., N.V. v. Union Capital Partners I, Inc., 92 F.3d 1110, 1120 (11th Cir. 1996); Williams v. Singletary, 78 F.3d 1510, 1515 (11th Cir. 1996). That rule is, if anything, particularly appropriate in Florida, where the state's highest court has held that "the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court]." Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (quoting Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980)).

There is no persuasive indication that the Florida Supreme Court would not follow the Fourth District Court of Appeal's BDO Seidman decision on whether its offer of judgment statute, Fla. Stat. § 768.79, applies when the case is governed by the substantive law of another state. The fact that we decided the issue differently is not a persuasive indication that the Florida Supreme Court would agree with us and not with one of its own intermediate appellate courts, which presumably knows more about Florida law than we do. Nor is the fact that one of the three judges dissented on this point in BDO Seidman, 802 So. 2d at 374 (Polen, C.J., dissenting), a persuasive indication that the Florida

Supreme Court would decide the issue differently. Two is a majority of three, and a majority of participating judges controls a court's decision. See Fla. R. Jud. Admin. 2.040(a)(1) (2002) ("Three judges shall constitute a panel for and shall consider each case, and the concurrence of a majority of the panel shall be necessary to a decision."). The holding in BDO Seidman is and will remain Florida law until such time, if any, as the Florida Supreme Court has the inclination and opportunity to rule to the contrary.

Of course, at the time we issued our decision in this case we did not have the benefit of the BDO Seidman decision, which was released on the very day we denied the petition for rehearing and suggestion for rehearing en banc in this case. In a diversity case, however, we are bound to follow any changes in a state's decisional law that occur during the case. See Huddleston v. Dwyer, 322 U.S. 232, 236, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246 (1944); see also Technical Coating Applicators, Inc. v. United States Fid. & Guar. Co., 157 F.3d 843, 845 (11th Cir. 1998) ("Intervening state decisions must be given full effect as if the decisions existed during the pendency of the case in district court."). We still have the authority, power, and duty to modify our decision to comport with the latest word from the Florida courts even though we have already denied rehearing, because we have not yet issued the mandate returning the case to the district court. The case is still before us and we can correct our missed guess about Florida law.

In light of the BDO Seidman decision, we rescind Part II.D of our prior decision, 256 F.3d at 1130, and in its place we hold that Florida's offer of judgment statute, Fla. Stat. § 768.79, is applicable to cases, like this one, that are tried in the State of Florida even though the

substantive law that governs the case is that of another state. n1

We turn now to the contentions raised by MBM and McMahan in this appeal that we did not reach in our previous opinion because of our no longer viable holding that Fla. Stat. § 768.79 was inapplicable in this case. Many of these born-again contentions are not sufficiently viable to warrant discussion because they either are so clearly without merit, or they are without merit and are of insufficiently general application, to warrant discussion in a published opinion. Those not mentioned are summarily rejected.

Some of the contentions we did not reach in our earlier opinion do warrant discussion, and some even have merit. For reasons we will discuss, we are going to remand this case for further proceedings relating to the amount of attorney's fees that should be awarded. Accordingly, we also rescind Part III(3) of our prior decision, 256 F.3d at 1135, and replace it with the conclusion at the end of this opinion.

II. THE DETERMINATION OF ENTITLEMENT

A. WHETHER THE OFFER WAS FACIALLY VALID

MBM and McMahan contend the district court erred by awarding Toto any attorney's fees and costs because his offer was facially defective in several ways. Toto's offer of judgment provided as follows:

Defendant, WILLIAM A. TOTO, hereby offers pursuant to Fla. Stat. § 45.061 to settle this case for the amount of $100.00 (One Hundred Dollars) upon a stipulation for dismissal, or, alternatively, pursuant to Fla. Stat. § 768.79, at Plaintiff's election, to allow judgment to be

taken against him in the total sum of $100.00 (One Hundred Dollars), in full and final resolution of all claims made in this action.

We review de novo a district court's interpretation of a state law. Fioretti v. Mass. Gen. Life Ins. Co., 53 F.3d 1228, 1234 (11th Cir. 1995).

First, MBM and McMahan contend the offer was invalid because it failed to state whether it included their claims for attorney's fees and costs and Toto's own claims for costs in his answer.

Florida Rule of Civil Procedure 1.442 governs settlements and provides that a settlement proposal must "state the total amount of the proposal . . . [and] state whether the proposal includes attorney's fees." Fla. R. Civ. P. 1.442(c)(2)(D) and (F). That rule applies to offers made pursuant to § 768.79. See United Servs. Auto. Ass'n v. Behar, 752 So. 2d 663 (Fla. 2d DCA 2000). Where an offer explicitly excludes attorney's fees, it is invalid because the total amount of the proposal is not stated. See State Farm Life Ins. Co. v. Bass, 605 So. 2d 908, 910 (Fla. 3d DCA 1992) (holding offer of judgment stating that attorney's fees and costs were to be determined at a later date did not satisfy Rule 1.442). But where an offer does not explicitly exclude attorney's fees, they are assumed to be included. See Unicare Health Facilities, Inc. v. Mort, 553 So. 2d 159, 161 (Fla. 1989) (stating that "there is an organic right of parties to contract a settlement, which by definition concludes all claims unless the contract of settlement specifies otherwise"); George v. Northcraft, 476 So. 2d 758, 759 (Fla. 5th DCA 1985) ("We think the right to an award of attorney's fees . . . is encompassed in an offer of judgment . . . which fails to mention them specifically or reserve a right to seek them later.").

Toto's offer did not specifically exclude attorney's fees. Further, it stated that it would be "in full and final resolution of all claims made in this action" (emphasis added), and that language is broad enough to cover both MBM and McMahan's claims for costs and attorney's fees, and Toto's own claims for costs. See Liberty Mut. Fire Ins. Co. v. Ramos, 565 So. 2d 798, 800 (Fla. 4th DCA 1990) (where offer did not specifically mention attorney's fees, holding that "when Ramos made the offer of settlement . . . the amount of money demanded necessarily included attorney's fees. If it were otherwise, the claims would not be terminated, the disputes would not be at an end, and the judicial process would be needed to intervene to resolve the disputed amount of attorney's fees."). Therefore, the offer of judgment was not invalid for failure to cover costs and attorney's fees.

Second, MBM and McMahan contend that Toto's offer was invalid because it failed to state with particularity the amount, if any, applicable to the claim for punitive damages. Both § 768.79 and Rule 1.442 provide that an offer must state with particularity the amount, if any, offered to settle a claim for punitive damages. Fla. Stat. § 768.79(2)(c); Fla. R. Civ. P. 1.442(c)(2)(E). Toto's offer did not specifically mention punitive damages, but it did state that, if accepted, it would be "in full and final resolution of all claims made in this action."

Florida courts have not addressed whether an offer that does not specifically address punitive damages can be valid under § 768.79 and Rule 1.442, but their approach to the attorney's fees requirement of Rule 1.442 is instructive. Rule 1.442(c)(2)(F) does say that offers should state whether they include attorney's fees, yet Florida courts have held those fees are included in offers where they are not mentioned as long as they are

not specifically excluded. See Unicare Health Facilities, 553 So. 2d at 161; Northcraft, 476 So. 2d at 759.

Extending that logic to the context of the punitive damages requirements of § 768.79(2)(c) and Rule 1.442(c)(2)(E) – and there is no apparent reason we should not – we conclude that Toto's offer satisfied those requirements because it did not explicitly exclude punitive damages from its coverage. If simple omission were not enough, the "final resolution" language of the offer is. The offer was not invalid under § 768.79 and Rule 1.442.

B. WHETHER THE OFFER WAS MADE IN BAD FAITH

If an offer satisfies the requirements of § 768.79(1)-(6), as this one did, "the sole basis on which a court can disallow an entitlement to an award of fees is if it determines that [the] offer was not made in good faith." Levine v. Harris, 791 So. 2d 1175, 1177 (Fla. 4th DCA 2001); see also § 768.79(7)(a) ("If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees."). The district court found that Toto's offer was made in good faith because "an appellate court of New York had . . . held that the Releasors had not breached their contracts," which means Toto "was reasonable in concluding that Plaintiffs could not make out their remaining claim of tortious interference, breach of contract being an essential element of that claim."

MBM and McMahan contend Toto's offer was made in bad faith because, at the time Toto made his offer, he had no reasonable basis for making it. At that time, although the New York court had entered its decision in

McMahan & Co. v. Bass, 250 A.D.2d 460, 673 N.Y.S.2d 19 (N.Y. App. Div. 1998), the district court had since denied Toto's motion for summary judgment on the tortious interference claim based on the Bass decision. That means, according to MBM and McMahan, "the validity of appellants' claim had been confirmed by the trial court, Toto was facing millions of dollars of potential liability and appellants had incurred thousands of dollars in legal fees incurred during three years of litigation" so "the $100 Offer could not be bona fide."

We review only for clear error the district court's finding that Toto acted in good faith, Turner v. Orr, 759 F.2d 817, 821 (11th Cir. 1985), and "the burden is upon the offeree to prove that the offeror acted without good faith," Levine, 791 So. 2d at 1178 (citing Schmidt v. Fortner, 629 So. 2d 1036, 1041 n.6 (Fla. 4th DCA 1993), approved by TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 613 (Fla. 1995)). Here, the offerees did not come close to carrying their burden of proof in the district court, and they are even further from convincing us that the district court clearly erred in deciding this issue against them.

Toto offered $100.00, a nominal amount. Although "nominal offers are suspect where they are not based on any assessment of liability and damages," Fox v. McCaw Cellular Communications of Fla., Inc., 745 So. 2d 330, 332 (Fla. 4th DCA 1998), they can be valid if the offerors have "a reasonable basis at the time of the offer to conclude that their exposure was nominal." Id. at 333. The good faith requirement of § 768.79(7)(a) does not "demand that an offeror necessarily possess, at the time he makes an offer or demand under the statute, the kind or quantum of evidence needed to support a judgment. The obligation of good faith merely insists that the offeror have some reasonable foundation on which to base an offer." Schmidt, 629 So. 2d at 1039.

The argument of MBM and McMahon that Toto lacked any reasonable basis for believing that he would prevail against them ignores the inconvenient fact that he did prevail against them. To accept in the same case in which a party did prevail the notion that there was no reasonable basis for that party prevailing would require self-contradiction on a scale that we are unwilling to consider. It is MBM and McMahon's argument that is illogical, and thus unreasonable.

III. THE DETERMINATION OF AMOUNT

We review only for abuse of discretion the amount of attorney's fees awarded by the district court. See Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1340 (11th Cir. 1999). The district court awarded Toto $260,034.29 in attorney's fees and costs. MBM and McMahan challenge that award on several grounds, only some of which merit discussion here.

A. WHETHER THE REQUESTED AMOUNT WAS INFLATED

MBM and McMahan contend that Toto's calculations of the amount of attorney's fees to which he was entitled was inflated by more than $70,000. They assert that on March 6, 2000, Toto's counsel discounted all of his attorney's fees to $136,103.54. They claim Toto's fee application sought that amount plus $51,394.76 in subsequent invoices, and that those figures totaled $187,498.30, not the $260,447.72 requested by Toto.

Toto disagrees with MBM and McMahan about the March 6, 2000 discount and, therefore, about the total amount sought. According to Toto, as of March 6, 2000, he had paid $71,730 in attorney's fees and had an outstanding balance of $151,226.16. He asserts that only

the outstanding balance was discounted by ten percent (from $151,226.16 to $136,103.54), and that the $71,730 he had already paid was not affected by that discount. He says that for services up to March 6, 2000, he sought in his fee application $71,730 plus $136,103.54, which totals $207,833.54. Additionally, he sought $51,394.76 in subsequent invoices for fees incurred thereafter.

Our review of the Verified Bill of Fees and Costs shows that, as of March 6, 2000, Toto had been billed for attorney's fees and costs in the amount of $222,956.16 ($1,125.00 for May 1999; $1,941.04 for June 1999; $74,682.71 for July, August, September, and October 1999; and $145,207.41 for November and December 1999). The Verified Bill states that "on March 6, 2000 . . . [Toto's attorney] agreed . . . to discount the then outstanding balance of $151,226.16 by ten percent to $136,103.54." (emphasis added). The term "outstanding balance" refers to the amount unpaid as of that date, see Black's Law Dictionary 1129 (7th ed. 1999); it does not refer to fees already paid. Therefore, any fees that were already paid were not affected by the ten-percent discount. Although the Verified Bill did not explicitly state that Toto had already paid $71,730, the implication was clear, because the $222,956.16 of attorney's fees and costs would reduce to an unpaid balance of $151,226.16 only if Toto had paid the difference of $71,730. Toto did not give up his claim to the full amount of the $71,730 he had already paid.

Adding the $71,730 that Toto had already paid to the $136,103.54 that resulted from the ten percent discount of the unpaid balance, and then adding to that sum the $48,282.26 of attorney's fees and costs from January, February, and March 2000, and the $3,112.50 anticipated for April 2000, the total comes to $259,228.30. Because the district court had already awarded taxable costs of

$4,799.33 pursuant to 28 U.S.C. § 1920, that amount is subtracted from $259,228.30, and the balance is $254,428.97.

In the verified bill, Toto sought $260,447.72. That figure is erroneous according to our calculations, because it is $6,018.75 more than the $254,428.97 to which Toto was entitled. (There is no reason to think that the error is anything other than a mathematical one.) We will remand to the district court for it to reduce the amount of attorney's fees awarded Toto by $6,018.75.

B. WHETHER THE AWARD EXCEEDED THE REQUEST

MBM and McMahan contend the district court's award of any attorney's fees beyond the $152,268.71 incurred as of December 21, 1999 was in error because Toto's counsel voluntarily limited the fee application to those incurred by that date. Toto's attorney's affidavit, submitted as part of the fee application, stated that he "cut off the claimed time immediately following the entry of the summary judgment [on December 21, 1999], even though the client has incurred fees to pursue the issue of entitlement to fees which is fairly recoverable."

That language could be plausibly interpreted in two ways. It could be construed to mean that any fees incurred from December 21, 1999 to any time in the future were "cut off," in the way MBM and McMahan insist. Or it could be read to mean that Toto was not going to seek fees incurred from December 21, 1999, to the date the affidavit was executed, January 20, 2000. Toto claims he initially decided to forego fees incurred during that period "in order to simplify the fee application – and in the hope that making such allowance would obviate a fight on reasonableness –

which obviously has not happened." As a result of the dispute over fees, Toto now wants to recover fees incurred during that period and afterwards.

Although the district court did not explicitly address this issue, it is clear from its order that the court read the fee application as not limiting the recovery of attorney's fees to those incurred before December 21, 1999, because the amount awarded was $260,034.29, well in excess of the $152,268.71 incurred as of that date. Given the ambiguity of the attorney's fee affidavit, the district court did not abuse its discretion in allowing Toto to recover attorney's fees incurred after January 20, 2000. But the attorney's affidavit clearly excluded any fees incurred from December 21, 1999 to January 20, 2000, and Toto never amended his application to seek those fees. Therefore, fees from that period should not have been awarded, and we remand to the district court to determine that amount and subtract it from the attorney's fees award.

C. WHETHER FEES FOR LITIGATING FEES WERE PROPER

Determining that time spent calculating the amount of attorney's fees due was not recoverable, the district court lowered Toto's fees request by $905, which is the amount of attorney's fees billed for "preparing the fees application." MBM and McMahan contend the district court did not go far enough. They say that it should also have excluded any fees for litigating the issue of how much fees were due, which they calculate would have reduced the award by another $51,973.75.

The Florida Supreme Court has held that, while attorney's fees incurred for litigating the issue of entitlement to attorney's fees are recoverable, fees

incurred for litigating the amount of attorney's fees are not. State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 833 (Fla. 1993). In the context of a contingency fee agreement, the Palma court explained that the work involved in litigating the amount of attorney's fees "inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment." Id. It noted the contrary federal court practice of allowing recovery of attorney's fees for litigating both entitlement and amount issues, and it distinguished that practice based on different statutory purposes. The purpose underlying most federal statutory fee authorizations, the Court explained, is "to encourage attorneys to represent indigent clients," and allowing recovery for fees from litigating the amount of fees comports with that purpose. Id. In contrast, the Florida statute involved in that case has a different purpose – "to discourage the contesting of valid claims . . . and to reimburse successful insureds for their attorney's fees," which led the Florida Supreme Court to the conclusion that the statute's purpose would not be furthered by permitting the award of attorney's fees incurred in litigating the amount of them due. Id. (internal quotation marks and citation omitted).

In this case we deal with attorney's fees awarded pursuant to § 768.79, the purpose of which is "to 'terminate all claims, end disputes, and obviate the need for further intervention of the judicial process' by encouraging parties to exercise their 'organic right . . . to contract a settlement, which by definition concludes all claims unless the contract of settlement specifies otherwise.'" MGR Equip. Corp. v. Wilson Ice Enters., Inc., 731 So. 2d 1262, 1264 (Fla. 1999) (quoting Unicare Health Facilities, Inc. v. Mort, 553 So. 2d 159, 161 (Fla. 1989)). That purpose does not include encouraging the representation of indigents and does not support an

award of attorney's fees incurred litigating the amount of those fees. See also Diaz v. Santa Fe Healthcare, Inc., 642 So. 2d 765, 766 (Fla. 1st DCA 1994) (holding that where at least one of the purposes of a statute awarding attorney's fees "is to encourage attorneys to represent indigent persons . . . the trial court has discretion . . . to make a fee award . . . which encompasses the time spent establishing the amount of the fee").

Toto attempts to distinguish Palma by noting that it concerned a contingency fee agreement, whereas "this is an hourly fee case [and Toto's attorneys] will get paid . . . regardless of any fee recovery." We are unpersuaded by that argument, because the Florida Supreme Court has explained that whether attorney's fees should be awarded for litigating the amount of fees due depends on the purpose of the statute under which the fees are sought; it does not depend on the method of calculating them. Palma, 629 So. 2d at 833.

The district court should have decreased Toto's attorney's fee award by the amount spent litigating the amount of attorney's fees to which he was entitled. MBM and McMahan claim that amount is $51,973.75, but they do not tell us how they arrived at that figure. On remand the district court should determine the amount of attorney's fees incurred by Toto in litigating the amount of attorney's fees, and subtract that amount from the fees to be awarded to him.

IV. CONCLUSION

We RESCIND Part II.D and Part III(3) of our prior decision, 256 F.3d at 1130-35, and replace them with the relevant parts of this opinion.

We REMAND this case to the district court for further

proceedings in which it should: 1) decrease the attorney's fees award by $6,018.75 (Part III.A, supra); 2) determine the amount of attorney's fees incurred from December 21, 1999 to January 20, 2000, and subtract that amount from the attorney's fees award (Part III.B, supra); 3) determine the amount of attorney's fees incurred by Toto in litigating the amount of attorney's fees, and subtract that amount from the attorney's fees award (Part III.C, supra);

We AFFIRM all other aspects of the district court's orders and judgment.

Footnotes

* Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

* Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

n1 MBM and McMahan contend we should not reconsider our prior decision because Toto's motion to do so is untimely under 11th Circuit Rules 35-2 and 40-3. Although both rules provide that petitions for rehearing "must be filed within 21 days of entry of judgment" (R. 35-2 addresses petitions for en banc rehearings; R. 40-3 addresses panel rehearings), they also state that counsel can "request extensions of time . . . for the most compelling reasons." We conclude the issuance of BDO Seidman by the Fourth District Court of Appeal of Florida is a "most compelling reason," given that it is directly on point with this case, is controlling, and is directly contrary to our previous decision in this case. Therefore, Toto's motion is not time-barred.

Nos. 00-10323, 00-14728

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

D. Bruce McMAHAN, Nemesis Veritas, f.k.a. McMahan & Company,
Plaintiffs-Appellants,

v.

William A. TOTO,
Defendant-Appellee.

D. Bruce McMahan, Nemesis Veritas, f.k.a. McMahan & Company,
Plaintiffs-Appellants, Cross-Appellees,

v.

William A. Toto,
Defendant-Appellee, Cross-Appellant.

July 10, 2001, Decided
July 10, 2001, Filed

COUNSEL: For D. Bruce McMahan, Nemesis Veritas, Appellants (00-10323): Patti E. Evans, New York, NY. Leigh R. Isaacs, New York, NY.

For William A. Toto, Appellee (00-10323, 00-14728): Hendrick G. Milne, Aballi, Milne, et al, Miami, FL.

For D. Bruce McMahan, Appellant (00-14728): Patti E. Evans, Isaacs & Evans, LLP, New York, NY.

For Nemesis Veritas, Appellant (00-14728): Patti E. Evans, Leigh R. Isaacs, Isaacs & Evans, LLP, New York, NY.

JUDGES: Before CARNES and MARCUS, Circuit Judges, and HAND *, District Judge.

OPINION BY: CARNES

OPINION:
CARNES, Circuit Judge:

Along with several other limited partners in McMahan, Brafman, Morgan & Company ("MBM"), William A. Toto filed a RICO action in federal court in New York against that company and D. Bruce McMahan after the Internal Revenue Service imposed penalties and disallowed deductions related to the company that he and the other limited partners had claimed. Several of the limited partners in that suit were dismissed, because their claims were precluded by release and assignment provisions contained in agreements between them and McMahan, MBM's principal general partner, in which he bought back their partnership interests. McMahan and MBM subsequently brought suit in state court against those limited partners alleging that by participating in the RICO action they had breached the release and assignment provisions of their agreements with him. The state court granted summary judgment in favor of the limited partners.

Before summary judgment was granted in the state court action, McMahan and MBM filed this diversity jurisdiction lawsuit in the Southern District of Florida against Toto for tortious interference with contractual relations, based on his actions in instituting the RICO action and encouraging the limited partners who were

later dismissed to participate in that lawsuit. The district court granted summary judgment to Toto and entered various orders relating to fees, costs, and sanctions. McMahan and MBM then appealed, and Toto cross-appealed. n1

In order to dispose of this appeal, an issue we must decide is whether the state court's decision collaterally estops McMahan and MBM from establishing that the dismissed limited partners breached their agreements, which is an essential element of the tortious interference claim. If it does, then a second and third issue are presented. The second issue is whether the district court abused it discretion by not imposing sanctions against MBM and McMahan or their counsel pursuant to Fla. Stat. § 57.105 and 28 U.S.C. § 1927. The third issue is whether under Florida's offer of judgment statute Toto is entitled to recover the attorney's fees he incurred since the making of an offer to settle the tortious interference claim.

As we will soon explain in full, we decide that collateral estoppel does bar the tortious interference claim, and that the district court did not abuse its discretion in declining to award sanctions. However, we decide that the district court erred in awarding attorney's fees pursuant to the offer of judgment statute.

I. BACKGROUND

A. FACTS

In September of 1980, MBM n2 was formed for the purpose, among other things, of trading government securities and commodities. From 1980 through 1982, between 300 and 400 investors purchased limited partnership interests in MBM, lured by the promise of

significant tax benefits. Toto bought in for $200,000 and received one partnership unit in MBM in return.

However, the promised tax benefits were, like many things in life, too good to be true, and the IRS subsequently disallowed many of the deductions claimed by the limited partners relating to MBM and imposed draconian penalties. The IRS notified Toto in late 1987 of its audit of MBM, and Toto eventually paid approximately $630,000 to settle his dispute regarding deductions he claimed relating to his investment in MBM.

Eventually, McMahan offered to buy back the interests of all of the MBM limited partners. As part of the sale of their interest to McMahan, each tendering limited partner executed a contract of sale and security agreement providing for the assignment to McMahan of all rights to any cause of action the limited partner may have in connection with (1) the original sale of the partnership interest to the limited partner, and (2) the conduct of MBM's business prior to the sale of the limited partner's interest. Each contract also provided that each tendering limited partner released MBM and its general partners from all claims arising from disallowance by the IRS of any tax benefits stemming from MBM. n3 Each contract provided that it would be governed by New York law. On December 31, 1984, McMahan bought back the interests of more than 80% of the limited partners of MBM. Toto, however, did not sell his limited partnership interest to McMahan.

In 1988 or early 1989, Toto contacted the law firm of Biegel & Sandler ("B&S") about filing a lawsuit against MBM and McMahan. Not prepared to fund the litigation himself, however, Toto contacted other MBM limited partners beginning in 1990 regarding his intention to sue

and inquiring as to their interest in joining him. In June of 1991 B&S also contacted the limited partners, stating that it required a minimum $25,000 retainer to pursue the action. B&S proposed that each limited partner contribute an amount equal to 1% of his or her investment in MBM towards the retainer, to be credited against a 1/3 contingency fee for B&S.

Eventually, fifteen limited partners retained B&S and filed suit in June of 1992 against MBM and McMahan (and others), alleging civil violations of the Racketeer Influenced and Corrupt Organizations Act and various state law theories of recovery ("the RICO Action"), claiming damages from the loss of their limited partnership investments, the disallowance of tax deductions, and imposition of penalties. The suit was filed in the United States District Court for the District of New Jersey, but that court determined that venue was inappropriate and the case was transferred to the Southern District of New York in July of 1993.

However, some of the limited partners who had joined in the RICO Action had, as part of the sale of their interests back to McMahan, signed a contract whereby they assigned and released certain rights. MBM and McMahan moved for summary judgment against these limited partners, whom we will call "the Releasors," arguing that they were prevented from bringing such an action by the terms of the contracts. On February 7, 1995, the district court granted the motion, rejecting the Releasors' argument that the assignments and releases were invalid because they were induced by fraud, and holding that the asserted claims were within the scope of the assignments and/or releases given by the Releasors. *See Toto v. McMahan, Brafman, Morgan & Co.*, 1995 U.S. Dist. LEXIS 1399, No. 93 CIV. 5894 (JFK) (S.D.N.Y. Feb. 7, 1995).

On January 5, 1996, MBM and McMahan filed a complaint against the Releasors in the Supreme Court of New York which asserted, among other things, a cause of action for breach of contract based on the Releasors' participation in the RICO Action despite the assignment and release provisions contained in the contracts. n4 MBM and McMahan sought damages in the amount of $30,000,000 as a result of the breach of their agreements by the Releasors. On May 19, 1998, the Appellate Division of the Supreme Court of New York held that the Releasors were entitled to summary judgment on the breach of contract cause of action, because the assignment and release provisions of the contracts constituted releases, and not covenants not to sue:

The assignment and release clauses contained in the contracts constitute releases, not implied covenants not to sue, because they relate to claims extant at the time the parties entered into the contracts. A release is a provision that intends a present abandonment of a known right or claim. By contrast, a covenant not to sue also applies to future claims and constitutes an agreement to exercise forbearance from asserting any claim which either exists or which may accrue ... The provisions at issue do not speak to the future, but rather are related to known events that had transpired prior to execution of the contracts, namely the Internal Revenue Service audit and the operation of the MBM partnership. Absent a covenant not to sue, there exists no implicit agreement by defendants to pay the attorneys' fees, as would result from breach of a covenant not to sue.

McMahan & Co. v. Bass, 250 A.D.2d 460, 673 N.Y.S.2d 19, 21 (N.Y.App.Div.1998). The parties filed a Stipulation of Discontinuance with Prejudice on September 2, 1999, thereby foreclosing any further appeal.

B. PROCEDURAL HISTORY

Not content with merely suing the Releasors, MBM and McMahan filed this lawsuit against Toto on May 6, 1996. Count I of their Second Amended Complaint alleged that Toto committed tortious interference with contractual relations by inducing the Releasors to participate in the RICO Action, even though he knew at the time that they had by the terms of the contracts released MBM and McMahan from any and all claims. Count II alleged Toto had engaged in malicious prosecution by prosecuting the RICO Action with full knowledge that it was barred by the assignments and releases contained in the contracts and without the consent of one of the Releasors.

On March 29, 1999, the district court granted Toto's motion for summary judgment as to Count II, the malicious prosecution claim, and that part of the case is not at issue in this appeal. But at the same time the court denied Toto's motion for summary judgment on Count I, the tortious interference claim. On May 11, 1999, acting pursuant to Fla. Stat. § 45.061 and, in the alternative, Fla. Stat. § 768.79, Toto made an offer to settle for $100 the litigation on Count I. His offer read as follows:

Defendant, WILLIAM A. TOTO, hereby offers pursuant to Fla. Stat. § 45.061 to settle this case for the amount of $100.00 (One Hundred Dollars) upon a stipulation for dismissal, or, alternatively, pursuant to Fla. Stat. § 768.79, at Plaintiff's election, to allow judgment to be taken against him in the total sum of $100.00 (One Hundred Dollars), in full and final resolution of all claims made in this action.

MBM and McMahan did not accept the offer.

On October 29, 1999, the district court again denied Toto's renewed motion for summary judgment as to Count I, the tortious interference claim. But on December 21, 1999, although nothing changed, the district court granted summary judgment to Toto on that claim. The basis of the district court's decision was that the New York state court decision in *Bass* collaterally estopped it from finding that the Releasors had breached their contracts, an essential element of the tortious interference claim against Toto.

Thereafter, Toto filed a motion (1) under Fla. Stat. § 57.105 for attorney's fees, (2) under 28 U.S.C. § 1927 for fees and costs due to the vexatious multiplication of proceedings, and (3) under Fla. Stat. § 768.79 for fees and costs. n5 The district court denied the motion for fees and costs pursuant to Fla. Stat. § 57.105 and 28 U.S.C. § 1927, but granted the one for fees and costs pursuant to Fla. Stat. § 768.79 and ordered MBM and McMahan to pay Toto a total of $260,034.29. MBM and McMahan have appealed the judgment against them on their Count I tortious interference claim and the order awarding fees and costs against them under Fla. Stat. § 768.79, while Toto has cross-appealed the order denying him fees and costs under Fla. Stat. § 57.105 and 28 U.S.C. § 1927.

II. DISCUSSION

We begin our discussion with MBM and McMahan's appeal from the summary judgment against them on the tortious interference claim, because if they are entitled to reversal of it the costs issues will be moot.

A. COLLATERAL ESTOPPEL

The district court granted summary judgment against

MBM and McMahan on their tortious interference claim because it concluded that they were collaterally estopped from pursuing that claim by the decision against them in *McMahan & Co. v. Bass*, 250 A.D.2d 460, 673 N.Y.S.2d 19, 21 (N.Y.App.Div.1998). In reaching that conclusion the district court followed a chain of reasoning with the following five links. First, Virginia law governs the tortious interference claim in this case. Second, under Virginia law in order to succeed on such a claim a plaintiff must show that the defendant engaged in "intentional interference inducing or causing a breach or termination of the relationship," *Krantz v. Air Line Pilots Ass'n*, 245 Va. 202, 427 S.E.2d 326, 328 (1993), which means that another party must have breached a contract with the plaintiff or terminated a contractual relationship with the plaintiff. Third, Virginia law gives a judgment from another jurisdiction the same preclusive effect it would receive in that jurisdiction. *See Coghill v. Boardwalk Regency Corp.*, 240 Va. 230, 396 S.E.2d 838, 840 (Va. 1990); *see generally* 28 U.S.C. § 1738 (state court judgments have the same preclusive effect in federal court they have in the state where the judgment was rendered). Fourth, under the law of New York, where the *Bass* decision was issued, a party is collaterally estopped from relitigating in another proceeding an issue necessarily decided against that party in a prior proceeding. *See Conte v. Justice*, 996 F.2d 1398, 1400-03 (2d Cir.1993). Fifth, in *Bass* the New York appellate court necessarily decided against MBM and McMahan the issue of whether the Releasors had breached a contractual undertaking not to sue MBM and McMahan. It follows from those five premises that because of the *Bass* decision MBM and McMahan are collaterally estopped from asserting that the Releasors breached a contractual obligation not to sue them, and without any breach MBM and McMahan's claim that Toto wrongfully induced a breach must fail.

MBM and McMahan do not deny that the district court's conclusion logically follows if the five premises we have set out for it are correct, nor do they take issue with the first four of those premises. The only one that MBM and McMahan dispute is the fifth premise–they contend that the *Bass* decision did not necessarily decide that there was no breach by the Releasors of a contractual obligation not to sue MBM and McMahan. Like the district court, we disagree.

In *Bass*, the complaint MBM and McMahan filed in New York state court against the Releasors claimed that by participating in the RICO Action in federal court the Releasors had breached agreements in the assignment and release provisions of their contracts with MBM and McMahan resulting in damages in the amount of $30,000,000. The Appellate Division of the Supreme Court of New York held that the agreements the Releasors had signed constituted releases, and not covenants not to sue. *Bass*, 673 N.Y.S.2d at 21. The result of the *Bass* litigation was that MBM and McMahan took nothing on their breach of contract claim. They lost on it. MBM and McMahan concede that they pleaded a breach of contract claim against the Releasors in *Bass* and that they did not prevail on it, but they maintain that somehow their contract claim was not decided; instead, they insist, in some unexplained way the contract claim was converted to one for attorney's fees only. How that could have happened is not entirely clear, and we conclude that it did not happen. Because the *Bass* court had a statutory duty to "dispose of all issues in the proceeding," N.Y. C.P.L.R. 7804(g), and the breach of contract claim was clearly raised in the pleadings, we think that claim actually was decided against MBM and McMahan in *Bass*. *See Grubb v. Public Utilities Comm'n of Ohio*, 281 U.S. 470, 477-78, 50 S. Ct. 374, 377-378, 74 L. Ed. 972 (1930) ("Omitting to mention that

question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it."); *Nelson v. Swing-A-Way Mfg. Co.*, 266 F.2d 184, 187 (8th Cir. 1959) ("The doctrine of collateral estoppel applies to matters necessarily decided in the former judgment even if there is no specific finding or reference thereto.").

Because we agree with the district court that MBM and McMahan are collaterally estopped from establishing in this lawsuit that the Releasors breached their contractual agreements, Toto is entitled to summary judgment on the tortious interference claim that he wrongfully induced them to do so. Our decision in this respect requires that we decide MBM and McMahan's appeal of the grant of costs and attorney's fees under Fla. Stat. § 768.79, and Toto's cross-appeal of the denial of attorney's fees under Fla. Stat. § 57.105 and the denial of sanctions under 28 U.S.C. § 1927. We start with the cross-appeal issues, which are the easiest ones to decide.

B. 28 U.S.C. § 1927

We review the trial court's ruling on an award of sanctions under 28 U.S.C. § 1927 only for abuse of discretion. *Peterson v. BMI Refractories*, 124 F.3d 1386, 1390 (11th Cir. 1997). As we have observed, the abuse of discretion standard of review recognizes that for the matter in question there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment we will not reverse even if we would have gone the other way had the choice been ours to make. *See In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994).

Toto, of course, contends that the district court's

decision not to award him sanctions against counsel for MBM and McMahan under 28 U.S.C. § 1927 is a clear error of judgment. Section 1927 provides that "any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. The district court refused to award sanctions under section 1927, stating simply that MBM and McMahan have not "unreasonably extended the proceedings." n6

The plain language of section 1927 sets forth three requirements to justify an imposition of sanctions:

(1) an attorney must engage in "unreasonable and vexatious" conduct;

(2) such "unreasonable and vexatious" conduct must "multiply the proceedings;" and

(3) the amount of the sanction cannot exceed the costs occasioned by the objectionable conduct.

Peterson, 124 F.3d at 1396. The critical question in this case involves the first *Peterson* factor–whether the filing of this lawsuit was "unreasonable and vexatious" conduct.

On this record, we cannot say that the district court abused its discretion in answering that question in the negative. Counsel for MBM and McMahan argued to the district court that the New York state court decision in *Bass* never decided the issue of whether the Releasors had breached their contracts by joining the RICO action. MBM and McMahan took the position that *Bass* had merely held that they were not entitled to attorney's

fees, which did not necessarily mean there had been no breach of contract by the Releasors. The district court and this Court have rejected their position since this lawsuit was filed, but that merely means there is no merit to the position. Something more than a lack of merit is required for § 1927 sanctions or they would be due in every case. The opinion of the Appellate Division of the Supreme Court of New York in *Bass* is not entirely clear, and actually does offer some support for MBM and McMahan's interpretation of that opinion, although not enough to convince us their interpretation is correct. *See generally Bass*, 673 N.Y.S.2d at 20-21 (stating that "[MBM] and McMahan seek payment of attorneys' fees in connection with the defense of the [RICO Action]"). Not only that, but the district court twice denied summary judgment to Toto on his collateral estoppel theory before finally concluding that MBM and McMahan's reading of the *Bass* decision was wrong.

Given these circumstances, we cannot say that it was a clear error in judgment for the district court not to award § 1927 sanctions against counsel for MBM and McMahan. That does not mean we would have reversed the district court had it awarded sanctions. As we explained in *Rasbury*, under an abuse of discretion standard there will be circumstances in which we would affirm the district court whichever way it went. 24 F.3d at 168 ("Quite frankly, we would have affirmed the district court had it reached a different result, and if we were reviewing this matter *de novo*, we may well have decided it differently.").

C. FLA. STAT. § 57.105

We turn now to the other part of Toto's cross-appeal, which is his contention that the district court erred in

failing to award him attorney's fees against MBM and McMahan under Fla. Stat. § 57.105, the frivolous litigation statute. Generally, a district court's decision about whether to award attorney's fees is reviewed for an abuse of discretion, *see Am. Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999), and, more specifically, a trial court's decision about whether to award attorney's fees under Fla. Stat. § 57.105 is reviewed only for an abuse of discretion. *Dep't of Health v. Curry*, 722 So. 2d 874, 879 (Fla. 1st DCA 1998).

Section 57.105, as it read in May of 1996 when MBM and McMahan filed their complaint in this lawsuit, provided, in relevant part:

The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client.

Section 57.105 was amended, effective October 1, 1999, but that amendment is not relevant to this case, because it was adopted more than three years after this lawsuit was filed. Because the complaint in this case was filed in May of 1996, before the October 1, 1999 effective date of the amendment to § 57.105, the "old" version of § 57.105 would apply, which only allows sanctions where there was a "complete absence of a justiciable issue of either law or fact raised by the complaint." *See Fla. Dep't of Revenue v. Lucignani*, 775 So. 2d 996, 997 n. 1 (Fla. 3d

DCA 2000) (holding that 1997 version of § 57.105 applies because the DOR's motion for contempt was filed before the effective date of the amendment to that section); *Visoly v. Sec. Pacific Credit Corp.*, 625 So. 2d 1276, 1277 (Fla. 3d DCA 1993) (holding that amendment to § 57.105 did not apply retroactively to a case that was commenced before the October 1, 1990 effective date of the amendment).

The question of whether § 57.105 even applies in a case such as this one, where the substantive law of Virginia governs the underlying claims, is one we need not answer. Assuming that § 57.105 does apply to this case, the district court's refusal to award attorney's fees under it is not an abuse of discretion. Given the less than pellucid clarity of the opinion in *Bass* and the fact that the district court twice decided not to grant summary judgment to Toto on the collateral estoppel theory of defense before finally doing so, we cannot say that it was a clear error of judgment for the district court to conclude that there was not a "complete absence of a justiciable issue of either law or fact raised by the complaint," which is the standard under § 57.105.

MBM and McMahan filed their complaint in this case charging Toto with malicious prosecution and tortious interference in May of 1996. The New York state court's decision in *Bass*, which held that the Releasors were entitled to summary judgment against MBM and McMahan on their breach of contract cause of action, was not issued until May of 1998. "The point in time to assess whether the granting of fees pursuant to section 57.105 is appropriate is at the lawsuit's inception, or in other words, at the time of the filing of the complaint." *Haas v. Roe*, 696 So. 2d 1254, 1256 (Fla. 2d DCA 1997). Thus, although the decision in *Bass* has collateral estoppel effect and precludes MBM and McMahan from

litigating their tortious interference claim here, it did not have that effect until two years after the complaint in this case was filed. Accordingly, we affirm the district court's holding that there was not a "complete absence of a justiciable issue of either law or fact" at the time the complaint was filed.

D. FLA. STAT. § 768.79

We review the district court's determinations of state law in a diversity case *de novo*. *See Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S. Ct. 1217, 1221, 113 L. Ed. 2d 190 (1991); *Ins. Co. of N. Am. v. Lexow*, 937 F.2d 569, 571 (11th Cir. 1991).

The question before us is whether the Supreme Court of Florida would apply its offer of judgment statute, Fla. Stat. § 768.79, to a case where Virginia substantive law governs the underlying claim. Section 768.79 provides, in relevant part:

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.

...

(2) ...
An offer must:

(a) Be in writing and state that it is being made pursuant to this section.
(b) Name the party making it and the party to whom it is being made.
(c) State with particularity the amount offered to settle a claim for punitive damages, if any.
(d) State its total amount.
The offer shall be construed as including all damages which may be awarded in a final judgment.

...

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.
(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:
1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

Fla. Stat. § 768.79.

Somewhat complicating matters, Florida Rule of Civil

Procedure 1.442 (Proposals for Settlement), adopted by the Florida Supreme Court, also covers the subject of offers of judgment. n7 Rule 1.442 is the procedural vehicle which a litigant can use to enforce the right to attorney's fees. The Florida Supreme Court retains final authority to control judicial procedure and, consequently, the provisions of Rule 1.442 supersede any contrary procedures contained in Fla. Stat. § 768.79. Fla. R. Civ. P. 1.442(a).

MBM and McMahan argue that under Florida choice-of-law principles, Virginia law determines whether Toto is entitled to recover the attorney's fees he incurred after his offer of judgment, and for that reason the award of attorney's fees to Toto pursuant to Fla. Stat. § 768.79 was incorrect. (Virginia has no offer of judgment rule or statute.)

Choice of Law: General Principles

Federal jurisdiction in this case is based on diversity of citizenship, and the forum state is Florida. As a federal court exercising diversity jurisdiction, we engage in a two-step inquiry to determine if Fla. Stat. § 768.79 is applicable. *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1118 (10th Cir. 1999); *Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc.*, 145 F.3d 463, 479 (1st Cir. 1998). In the first step, we determine whether the matter at hand is procedural or substantive for *Erie R.R. Co. v. Tompkins* purposes. 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). If the matter is procedural then federal law will apply; but if the matter is substantive, then we will apply the law of the forum state. *See Erie*, 304 U.S. at 78, 58 S. Ct. at 822 (a federal court sitting in diversity applies state substantive law). If we do determine that the matter is substantive, we examine the substantive law of

the forum state, which includes its choice-of-law rules, to ascertain the applicable substantive law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477 (1941); *Boyd*, 174 F.3d at 1118; *Servicios*, 145 F.3d at 479. We note, however, that the two steps are independent of each other, and thus a finding that a matter is substantive or procedural for *Erie* purposes does not compel the same characterization for choice-of-law purposes. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 726, 108 S. Ct. 2117, 2124, 100 L. Ed. 2d 743 (1988); *Boyd*, 174 F.3d at 1118; *Servicios*, 145 F.3d at 479-80.

a. Is Fla. Stat. § 768.79 Substantive or Procedural for Diversity Purposes?

It is clear that statutes allowing for recovery of attorney's fees are substantive for *Erie* purposes. *See All Underwriters v. Weisberg*, 222 F.3d 1309, 1311-12 (11th Cir. 2000) (holding Florida statute which allowed an insured or named beneficiary under an insurance policy to recover attorney fees upon judgment in insured's favor was substantive for *Erie* purposes); *see also MRO Communications, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1282 (9th Cir.1999) ("In an action involving state law claims, we apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule.") (citation omitted); *In re King Resources Co.*, 651 F.2d 1349, 1353 (10th Cir. 1981) ("Thus in diversity cases generally, and certainly in this circuit, attorney fees are determined by state law and are substantive for diversity purposes."). As the Supreme Court has stated:

In an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of

court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.

Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 259 n. 31, 95 S. Ct. 1612, 1622 n. 31, 44 L. Ed. 2d 141 (1975) (citation and quotation omitted). Accordingly, we turn to Florida's choice-of-law rules to determine whether Toto was entitled to attorney's fees in this tortious interference action.

b. Florida Choice-of-Law Principles

Several decisions from Florida's intermediate appellate courts have, albeit without discussion of the choice-of-law issue, held that the availability of attorney's fees should be determined under the state law which also governs the underlying claim. In *Montalvo v. Travelers Indem. Co.*, 643 So. 2d 648, 651 (Fla. 5th DCA 1994), Florida's Fifth District Court of Appeal, in remanding a case concerning interpretation of two automobile insurance contracts to the trial court, directed that the amount of attorney's fees be determined pursuant to North Carolina law, which controlled the interpretation of the insurance contracts. *But cf. Weatherby Assocs., Inc. v. Ballack*, 783 So. 2d 1138, 1143 (Fla. 4th DCA 2001) (affirming trial court's award of attorney's fees pursuant to § 57.105 where former employer's suit became frivolous after filed even though employment contract between parties stated that Connecticut law would apply to any litigation arising out of the employment agreement, and holding that "the choice of law provision in the agreement is irrelevant, because the trial court did not award attorney's fees pursuant to the agreement. Rather, the court awarded attorney's fees pursuant to section 57.105(1) ... ").

In *Andrews v. Continental Ins. Co.*, 444 So. 2d 479 (Fla. 5th DCA 1984), the court held that even though an automobile accident occurred in Florida, Maine had the most significant relationship with the occurrence, and that required application of Maine law about whether to confirm an arbitration award. In remanding to the trial court, the Fifth District Court of Appeal held that whether attorney's fees were allowed should also be decided under Maine law. *Id.* at 483.

Finally, in *Hirsch v. Hirsch*, 369 So. 2d 407 (Fla. 3d DCA 1979), Florida's Third District Court of Appeal had previously determined in a related proceeding involving the same parties that New York law applied to a controversy regarding the provisions of a separation agreement, because the parties had specified New York law in that agreement. The appellate court reversed the part of the trial court's judgment increasing support provisions to the wife, and remanded for reconsideration of the award of attorney's fees in light of the reversal on the merits. In doing so, the appellate court noted that attorney's fees could be granted to the wife even though she was unsuccessful in securing a modification, because New York law so provided. *Id.* at 409.

In applying Florida's choice-of-law rules, procedural matters are governed by Florida law, even where another forum's substantive law applies. *See Aerovias Nacionales De Colombia, S.A. v. Tellez*, 596 So. 2d 1193, 1194-95 (Fla. 3d DCA 1992) (although New York law applied to substantive matters in wrongful death action, Florida procedural law applied). We believe the Supreme Court of Florida would hold that Fla. Stat. § 768.79 is not a "local law rule[ ] prescribing how litigation shall be conducted." Restatement (Second) of Conflict of Laws § 122. Instead, it would hold that Fla.

Stat. § 768.79 modifies the substantive rights of the parties. Accordingly, we believe that the Supreme Court of Florida would not apply Fla. Stat. § 768.79 to a case otherwise governed by the substantive law of Virginia.

In this regard, we find the Florida Supreme Court's discussion of the division of responsibility for enacting substantive and procedural rules informative:

Article V, section 2(a), of the Florida Constitution provides this Court with exclusive authority to adopt rules for practice and procedure in the courts of this State. The Legislature, on the other hand, is entrusted with the task of enacting substantive law...\ The Legislature has modified the American rule, in which each party pays its own attorney's fees, and has created a substantive right to attorney's fees in section 768.79 on the occurrence of certain specified conditions.

TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995). Thus, the task of enacting procedural rules that apply even where another forum's substantive law governs is confined to the Supreme Court of Florida. *See In re Amendments to Florida Rules of Civil Procedure*, 682 So. 2d 105, 105-06 (Fla. 1996) (Florida Supreme Court rejected amendments to Fla. R. Civ. P. 1.442 that were at variance with Fla. Stat. § 768.79 because of legislative prerogative to enact substantive law); *Timmons v. Combs*, 608 So. 2d 1, 2-3 (Fla.1992) ("It is clear that the circumstances under which a party is entitled to costs and attorney's fees is substantive and that our rule [Fla. R. Civ. P. 1.442] can only control procedural matters."). n8 But the Florida legislature is entrusted with the task of enacting substantive laws, for choice-of-law purposes, which it exercised in enacting Fla. Stat. § 768.79.

Our conclusion that Fla. Stat. § 768.79 is a substantive law, for choice-of-law purposes, is buttressed by the fact that it is properly viewed as a type of "loser pays" rule or standard, instead of a sanction for frivolous litigation. In *Servicios*, 145 F.3d at 480-81 n. 9, the First Circuit explained that "loser pays" rules might be substantive for conflicts purposes:

> Peru's "loser pays" rule, which presumably always provides an award of attorney's fees to the prevailing party in a suit, has a much better claim to being "substantive" [for purposes of Puerto Rico conflict of laws analysis] than a rule awarding attorney's fees only as a sanction for frivolous litigation. After all, a "loser pays" rule could be conceived of as adding an award of attorney's fees to the recovery provided by the underlying cause of action.
>
> Loser pays attorney's fees are those awarded to a party merely for prevailing in their suit. *Boyd*, 174 F.3d at 1125-26. Bad-faith attorney's fees, by contrast, are those awarded "against a losing party who acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 1126.

Toto notes, as did the district court, that Florida courts have occasionally described § 768.79 as a penalty designed to encourage litigants to act reasonably and in good faith in settling lawsuits. *See, e.g., Eagleman v. Eagleman*, 673 So. 2d 946, 947 (Fla. 4th DCA 1996); *Goode v. Udhwani*, 648 So. 2d 247, 248 (Fla. 4th DCA 1994). That description does not change the fact that § 768.79 provides for a mandatory award of attorney's fees where the offer of judgment is rejected, instead of a discretionary award of attorney's fees designed to sanction frivolous litigation. *See TGI Friday's*, 663 So. 2d at 611 (Fla. Stat. § 768.79 provides for award of

attorney's fees regardless of reasonableness of offeree's rejection of offer of judgment); *Jordan v. Food Lion, Inc.*, 670 So. 2d 138, 140 (Fla. 1st DCA 1996) (Fla. Stat. § 768.79 creates mandatory right to attorney's fees when statutory prerequisites are satisfied, i.e., when a party makes an offer for settlement and that party has recovered a judgment at least 25 percent more or less than the offer). Thus, § 768.79 is a "loser pays" type of rule or standard. n9

Fla. Stat. § 45.061, which is no longer effective, contained language indicating that an award of attorney's fees was discretionary, because it provided that the court "may" award fees if it determined an offer of judgment had been "rejected unreasonably." However, similar language was not included in § 768.79, which uses the word "shall." Accordingly, attorney's fees must be awarded once the statutory prerequisites are satisfied, regardless of the reasonableness of the offeree's rejection. *Knealing v. Puleo*, 675 So. 2d 593, 595 (Fla. 1996) ("the right to an award [of attorney's fees and costs] depends only on the amount of the rejected offer and the amount of the later judgment" and "the reasonableness of the plaintiff's rejection is irrelevant to the question of fee entitlement"). As the Florida Supreme Court has noted:

Under this statute, the legislature did not give judges the discretion to determine whether it is reasonable to entitle qualifying plaintiffs to fees. Rather, it determined for itself that it is reasonable to entitle every offeror who makes a good faith offer (later rejected) ... to an award of fees. Under subsection (7)(b), the court's discretion is directed by the statutory text solely to determining the reasonability [sic] of the *amount* of fees awarded.

TGI Friday's, 663 So. 2d at 613.

For all of these reasons, we conclude that Florida choice-of-law principles compel the application of Virginia law on attorney's fees. MBM and McMahan allege, and Toto does not disagree, that Virginia law does not allow recovery of attorney's fees in this case.

III. CONCLUSION

For the foregoing reasons, (1) we AFFIRM the district court's grant of summary judgment in favor of Toto on the tortious interference claim, (2) we AFFIRM the district court's decision not to award fees and costs under Fla. Stat. § 57.105 and 28 U.S.C. § 1927, and (3) we REVERSE the district court's decision to award attorney's fees under Fla. Stat. § 768.79.

Footnotes

* Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

n1 Although there are two appeals with two different case numbers before us, we have consolidated the appeals for decisional purposes.

n2 MBM changed its name to McMahan & Company on January 16, 1985, and to Nemesis Veritas, L.P. on July 30, 1996. To avoid confusion we will use the old name throughout this opinion.

n3 Paragraph 13 of each contract provides, in relevant part:

13. Assignment and Release of Claims. The Seller hereby assigns to the Purchaser all of his right, title and interest

in and to any and all causes of action, suits, claims and demands whatsoever against any party which the Seller ever had, now has, or hereafter can, shall or may have, by reason of or in connection with the sale of the Interest by the Partnership to the Seller and (b) [sic] the conduct of the Partnership's business prior to the date of the Seller's tender of his Interest, but excluding claims in connection with the solicitation of Interests pursuant to which this Agreement is being executed.

The Seller hereby releases the Partnership and the general partners thereof, and, to the fullest extent applicable, their respective heirs, executors, successors, employees, agents and assigns, from all causes of action, suits, claims and demands whatsoever which the Seller ever had, now has, or hereafter can, shall or may have, by reason of any damages arising from any and all claims which might arise upon disallowance by the Internal Revenue Service of tax benefits previously taken by the Partnership.

n4 The complaint alleges, in relevant part:

AS AND FOR A FIRST CAUSE OF ACTION

(Breach of Contract)

...

21. Notwithstanding their execution of the Contracts of Sale and Sales Agreement, and the releases contained therein, defendants proceeded to breach their agreements by suing plaintiffs and others in the United States District Court, District of New Jersey and the United States District Court, Southern District of New York, for alleged violations of the Racketeer Influenced and Corrupt Organizations Act, fraud, breach of

fiduciary duty and negligent misrepresentation in the sale of said limited partnership interests.

...

24. By reason of defendants' breach of the aforementioned agreements, plaintiffs have sustained damages in an amount in excess of $30,000,000 for which defendants are jointly and severally liable.

n5 Toto also filed a motion for costs (other than attorney's fees) under Fed.R.Civ.P. 54(d) and 28 U.S.C. § 1920, which was granted in the amount of $4,799.33. MBM and McMahan make no argument that costs were incorrectly taxed against them in that regard, and accordingly no issue concerning that award is before us in this appeal. *Federal Sav. & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 n. 3 (11th Cir. 1987) ("Issues that clearly are not designated in the appellant's brief normally are deemed abandoned.").

n6 The statute speaks of sanctions against counsel, *see* 28 U.S.C. § 1927, while the district court spoke of the actions of MBM and McMahan, which we take to be a shorthand reference to their counsel.

n7 To complicate matters even further, the Florida legislature enacted another statute governing attorney's fees and costs related to the acceptance or rejection of offers of settlement and judgment, Fla. Stat. § 45.061, although it has been repealed for causes of action accruing after October 1, 1990. *See Timmons v. Combs*, 608 So. 2d 1, 3 (Fla.1992).

n8 *See also Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1120 (10th Cir. 1999):

In the choice-of-law context, most matters are treated as substantive. Only in particular instances should a court consider a matter to be procedural. If a case "has foreign contacts and ... many issues in the case will be decided by reference to the local law of another state," a state should label an issue "procedural" and thus apply its own law only when to do so would serve the purpose of efficient judicial administration. Restatement § 122 cmt. a. The range of issues relating to efficient judicial administration is narrow and includes such items as "the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs." *Id.*; *see generally id.* ch. 6. These are matters in which it would be especially disruptive or difficult for the forum to apply the local rules of another state, and in which failure to employ another state's law will not undermine interstate comity.

(footnote omitted).

n9 We also note that the Florida Supreme Court's discussion in *TGI Friday's*, 663 So. 2d at 611, of the legislature's decision in section 768.79 to modify the traditional American rule that each party pays its own fees strongly suggests that section 768.79 constitutes a "loser-pays" attorney's fees statute. *See Boyd* 174 F.3d at 1126:

Loser-pays attorney's fees are normally not within a court's inherent power. Instead, they reflect a conscious policy choice by a legislature to depart from the American rule and codify the English rule... The authority to award bad-faith attorney's fees, though frequently codified, is usually within a court's inherent powers ...

(citation omitted).

CASE NO. 96-8294-CIV MIDDLEBROOKS

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF FLORIDA

NEMESIS VERITAS, L.P., f/k/a
MCMAHAN & COMPANY and
D. BRUCE MCMAHAN,
Plaintiffs,

v.

WILLIAM A. TOTO,
Defendant.

ORDER ON FEES AND COSTS

This Cause came before the Court upon Defendant's Verified Motion for Fees and Costs, filed January 20, 2000 (DE#176). This Motion followed the Court's order dated December 21, 1999, granting Defendant summary judgment. The Court has reviewed the file, including the pleadings responsive to and in support of Defendant's motion, and is otherwise filly informed in the premises.

Defendant seeks attorney's fees and costs under the following provisions: Fla. Stat. § 768.79, which allows for fees and costs where there has been a finding of no liability following an offer of settlement; Fla. Stat. § 57. 105, which authorizes fees where the court finds claims to be frivolous; 28 U.S.C. § 1927, which requires attorneys who have unreasonably extended proceedings to satisfy the excess fees and costs incurred; Fed. R. Civ. P. 54(d), which provides that the prevailing party shall recover its costs, other than its attorney's fees, as of course under 28 U.S.C. § 1920.

The Court declines to grant Defendant fees and/or costs under Fla. Stat. § 57.105 and 28 U.S.C. § 1927, finding that Plaintiffs have neither filed frivolous claims nor unreasonably extended the proceedings. Below, the Court takes up the other two bases.

1. Fla. Stat. §768.79

On May 11, 1999, Defendant made an offer of settlement/judgment to Plaintiffs in the amount of $100.00, pursuant to Fla. Stat. § 45.061 and, in the alternative, Fla. Stat. § 768.79. Defendant has since acknowledged that § 45.061 had been repealed prior to the offer, invalidating the offer as premised on that provision. Thus, we need only address Defendant's offer under § 768.79. That provision provides, in pertinent part, that a defendant who makes an offer of judgment that is not accepted in a case where there is a judgment of no liability, the defendant is entitled to recover his reasonable costs and attorney's fees incurred from the date the offer was filed. Fn1 Fla. Stat. § 768.79(1).

A. What state's law governs attorney's fees issue?

This basis for recovery of fees and costs necessitates a choice of law analysis. In performing this analysis, we are guided by the First Circuit's opinion in Servicios Comerciales Andinos, LA. v. General Elec. Caribe, Inc., 145 F. 3d463 (1st Cir. 1998), which was followed by the Tenth Circuit in Boyd Rosene and Assocs., Inc. v. KansasMunic4xzl Gas Agency, I 74 F.3d I 1 15 (10th Cir. 1999). In Servicios Comerciales, the First Circuit was in the same position we now find ourselves in: determining what state's law to apply to a claim for attorney's fees while exercising diversity jurisdiction.

A federal court sifting in diversity must engage in a two-step inquiry. See Servicios Comerciales, 145 F.3d at 479. First, the court must determine whether a particular matter is procedural or substantive for Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) purposes. Id. If the matter is procedural, then federal law applies; if the matter is substantive, then the court follows the law of the forum state. Id. Second, if the court has determined that the matter is substantive for Erie purposes, then it looks to the substantive law of the forum state, including its choice of law principles, to determine the applicable substantive law. See Boyd Rosene, I 74 F.3d at 1118 (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); see also Trumpet Vine lnvs. v. Union Capital Partners L Inc., 92 F.3d 1110, 1115 (11th Cir. 1996). These steps are distinct: what is substantive or procedural for Erie purposes is not necessarily substantive or procedural for choice of law purposes. Id. (citing Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988) (rejecting notion that "there is an equivalence between what is substantive under the Erie doctrine and what is substantive for purposes of conflict of law")).

i Erie

The Tenth Circuit in BoydRosene summarily dispensed with the first inquiry, citing precedent for the proposition that attorney's fees are substantive for Erie purposes. Fn2 See id. (citing King Resources Co. v. Phoenix Resources Co., 651 F.2d 1349 (10th Cir. I 981)). Language in Phoenix Resources suggests that its rule cuts across circuit boundaries and is applicable in diversity cases generally. See Phoenix Resources, 65 1 F.2d at 1353 ("Thus in diversity cases generally, and certainly in this circuit, attorney fees are determined by state law and are substantive for diversity purposes). Moreover, the Phoenix Resources court cites Alyseka

Pipeline Co. v. Wilderness Soc 'y, 421 U.S. 240, 259 n. 3 1 (1975), a case binding on the Eleventh Circuit, as standing for the proposition that attorney fees are substantive for diversity purposes. Fn3 See also Whiteside v. New Castle Mut. Ins. Co., 595 F. Supp. 1096, 1 100 (D. Del 1984) ("under Erie principles, attorney's fees are considered substantive and controlled by state law in diversity cases.").

Eleventh Circuit attorney's fees analyses have been less explicit in distinguishing the Erie and choice of law inquiries. In American Family Life Assurance Co. of Columbus, Georgia V. United States Fire Co., 885 F.2d 826 (11th Cir. 1989), the Eleventh Circuit stated that "[i]n diversity cases, the choice-of-law rules of the forum state determine which state's substantive law applies." Id. at 830; see also Union Capital Partners, 92 F.3d at 1115 ("In determining which law applies, a federal district court sifting in diversity must apply the choice of law rules of the forum state."). Implicit in American Family, assuming the Eleventh Circuit follows the two-step process, was a finding that the issue in question - whether the plaintiff was entitled to attorney's fees was a substantive one, mandating application of the forum state's substantive law concerning choice of law.

In Tanker Management, Inc. v. Brunson, 918F.2d 1524 11th Cir. 1990), the Eleventh Circuit did, however, examine whether the federal offer of judgment rule - Federal Rule of Civil Procedure 68 preempted the Florida statutory offer of settlement provision Fla. Stat. § 45.061 - thereby performing the Erie analysis in a context similar to the one before this Court. Fn4 The Tanker court, however, did not need to conduct a substance versus procedure analysis. Instead, the court rested its ruling on the principle that Erie commands the enforcement of state law where there is no federal rule

that covers the issue in dispute. Tanker, 91 8 F.2d at 1528 (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 750 (1980)). Thus, the court held that Rule 68 did not preempt the state law, whether or not the state law was substantive or procedural in nature. The Tanker court found that § 45.061 and Rule 68 were not in "direct collision" because "Rule 68 concerns only interest and offers of judgment, while the Florida statute concerns attorney's fees, offers of judgment and settlement offers." Id. See also MRO Communications, Inc. v. American Tel. & Tel. Co., 197 F.3d 1276, 1282 (9th Cir. 1999) ("In an action involving state law claims, we apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule.").

Whether § 768.79 "collides" with Rule 68 is a closer call, as both govern offers of judgment. We find that, for purposes of Erie, there is no "collision." Whereas Rule 68's application is limited to instances where a judgment is finally obtained by the offeree, § 768.79 applies even where there is a judgment of no liability. Compare Fed. R. Civ. P. 68 and Fla. Stat. § 768.79(1). Thus, § 768.79 is broader than Rule 68; it does not conflict with Rule 68. See Walker, 446 U.S. at 750 ("[T]he scope of the Federal Rule [is] not as broad as the losing party urge[s], and therefore, there being no Federal Rule which cover[s] the point in dispute, Erie command[s] the enforcement of state law."). Alyeska offers further support, noting that state laws generally do not conflict with a federal statute or rule of thecourt .Alyeska, 421 U.S. at259n. 3l. Fn5

Based on the foregoing discussion, particularly the Supreme Court's footnote in Alyeska, we find that the attorney's fees are substantive for Erie purposes and move to step two of the analysis.

ii Florida's choice of law

Is § 768.79 substantive or procedural under Florida's choice of law rules? Although the Florida Supreme court has not addressed this issue directly, we believe that it would apply the choice of law rules of the Restatement (Second) of Conflicts of Laws (1971), as Florida courts have utilized this treatise in other choice of law areas. See International Ins. Co. v. Johns, 874 F.2d 1447, 1458 n. 19 (11th cir. 1989). Restatement (Second) of Conflict of Laws § 122 provides that "{a} court usually applies its own local rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case." Thus, even though we decided that Virginia law would govern Plaintiffs' claim of tortious interference, see March 29, 1999 Order at 9 (DE#75), we might apply Florida law to Defendant's offer of judgment if such offers relate to judicial administration.

In Servicios Comerciales, the First Circuit characterized the issue before it as "whether, pursuant to section 122 of the Restatement, the courts of the Commonwealth of Puerto Rico would apply Rule 44. 1 in a suit otherwise subject to the laws of another state or country." The court concluded that it would, finding that Rule 44. 1 is, in the words of § 122, a " local law rule~} prescribing how litigation shall be conducted." Servicios Comerciales, 145 F.3d at 480. The purpose of rule 44. I "is to penalize 'a losing party that because of his stubbornness, obstinancy, rashness, and insistent frivolous attitude has forced the other party to needlessly assume the pains, costs, efforts, and inconveniences of a litigation." Id. (internal citations omitted). As support for its decision, the court found that Rule 44. 1 did not modify the parties' substantive rights, but instead "served the institutional concerns of

the courts by allowing the imposition of sanctions upon parties who abuse the judicial process." Id.

Implicit in the court's reasoning is its recognition of a distinction between "loser pays" rules and rules awarding attorney's fees as a sanction for frivolous or unnecessary litigation, finding that the former rules are more readily categorized as "substantive." See id. at 48 I n. 9. "Loser pays" rules, which as a matter of course authorize attorney's fees to the prevailing party, "could be conceived of as adding an award of attorney's fees to the recovery provided by the underlying cause of action." Id. In addition, "loser pays" rules "are normally not within a court's inherent power. Instead, they reflect a conscious policy choice by a legislature to depart from the American rule and codify the English rule." Boyd Rosene, 174F.3d at 1126. Fn6

Like Rule 44.1, Fla. Stat. § 768.79 is more aptly described as a sanction than as a "loser pays" rule. Its purpose is "to encourage litigants to resolve cases early to avoid incurring substantial amounts of court costs and attorney's fees. It serves as a penalty for parties who fail to act reasonably and in good faith in settling lawsuits." Eagleman v. Eagleman, 673 So.2d (Fla. Dist. Ct. App. 1996) (internal citations omitted). See also Goode v. Udhwani, 648 So.2d 247, 248 (Fla. Dist. Ct. App. 1994) ("The purpose ofsection 768.79 was to serve as a penalty if the parties did not act reasonably and in good faith in settling lawsuits. The statutory language even refers to 'the penalties of this section.").

For further support of its determination that Rule 44.1 was procedural, the Servicios Comerciales court turned to the factors listed in the comments to § 122, which bear on whether a provision is substantive or procedural. Fn7 As in Servicios Comerciales, there is no

indication that the parties to the dispute before this Court intended to exclude the applicability of Fla. Stat. § 768.79, or to make applicable the litigation rules of Virginia, or another forum. See id. Nor is resolution of the attorney's fees issue "likely to affect the ultimate result of the case." Id. (quoting § 122 cmt. A.). Though charging Defendant's fees to Plaintiffs under § 768.79 does entail the payment of a monetary penalty, the penalty "is not a remedy arising out of the cause olfaction." Id. Third, as the Servicios Comerciales court noted, attorney's fees provisions have not been consistently labeled either "procedural" or "substantive" for choice of law purposes. Id. The fourth factor, unlike the preceding three, does not as clearly support finding § 768.79 to be procedural, for applying Virginia's rule of judicial administration, as opposed to Florida's, would not impose an undue burden on the Court. See § 122 cmt. A.

For the foregoing reasons, we find § 768.79 to be a procedural rule and thus apply it in determining whether Defendant was entitled to attorney's fees.

B. Application of § 768.79

Plaintiffs argue that even were § 768.79 to apply in this case, Defendant's offer was procedurally invalid, for Defendant failed to include elements prescribed by law. Specifically, Plaintiffs allege that the offer fails to identify the offerees with the requisite particularity; does not terminate the litigation, rendering it a nullity; fails to state whether it includes claims for costs, including attorney's fees; is based on a repealed statute; and fails to state with particularity the amount, if any, for punitive damages. In addition, Plaintiffs maintain that even were the Court to deem the offer procedurally valid, the Court should find that the offer was not made

in "good faith" and therefore exercise discretion to disallow recovery of fees and costs under § 768.79. See Fla. Stat. §768.79(7)(a).

i Procedural deficiencies

Plaintiffs' two strongest arguments that Defendant's offer was procedurally deficient under § 768.79 and Florida Rule of Civil Procedure 1 .442, which govern settlement offers authorized under Florida law, are as follows: First, Plaintiffs argue that the offer failed to clearly identify the party or parties to-which the offer was directed. Second, assuming the offer was, as Defendant maintains, made to both Plaintiffs, the offer failed to apportion the offer between the Plaintiffs.

Based on the language of the offer alone, it is not clear that Defendant intended his offer to apply to both Plaintiffs. Indeed, the plain language suggests that the offer applied only to one of the Plaintiffs, as it refers to "Plaintiff's election." (emphasis added). See Def. 's "Offer of Settlement and/or Judgment, Exh. A to Def.'s Mot. Fn8 Were the offer extended to only one of the Plaintiffs, it would be invalid, for its acceptance would not have brought an end to the litigation, for a Plaintiff would remain. See DiPaola v. Beach Terrace Assoc., Inc., 718 So.2d 1275, 1277 (Fla. Dist. Ct. App. 1998) (finding invalid offer whose acceptance would not have terminated litigation, for one of the purposes of § 768.79 is early termination of litigation). Moreover, even assuming the offer was directed at both Plaintiffs, Plaintiffs argue the offer was still invalid because it failed to clearly specify the offerees in derogation of the procedural requirements. See Fla. Stat. § 768.79(2)(b) ("An offer must [n]ame the party making it and the party to whom it is being made."); Fla. R. Civ. P. 1.442(c)(A) (same).

Next Plaintiffs argue, again assuming the offer was made to both Plaintiffs, that the offer failed to apportion the amount offered between the Plaintiffs in derogation of the procedural requirements. See Fla. R. Civ. P. 1.442(c) (3) ("A joint proposal shall state the amount and terms attributable to each party."); see also McFarland & Sons, Inc. v. Basel, 727 So.2d 266, 270 (Fla. Dist. Ct. App. 1999) (holding that a general offer of judgment made to a group of defendants without assigning each defendant a specific amount lacks the particularity required by rule 1.422); Di Paola 718 So.2d at 1277 (same); Twiddy v. Guttenplan, 678 So.2d 488, 489 (Fla. Dist. Ct. App. 1996) (same). Fn9

Despite the principle that "[s]tatutes authorizing awards of attorney's fees are in derogation of common law, and must be strictly construed," McMullen Oil Co., Inc. v. ISS Int'l Serv. Sys., Inc., 698 So.2d372, 373 (Fla. Dist. Ct. App. 1997), we find that to invalidate Defendant's offer on the technical grounds asserted by Plaintiffs would be to put form before substance.

We reject Plaintiffs' argument premised on their contention that the offer was made to only one of the Plaintiffs. To hold otherwise would be to invalidate Defendant's offer on the grounds that he misplaced an apostrophe. We credit Defendant's claim that his reference to "Plaintiffs" rather than "Plaintiffs" was a mere typographical error. See Def.'s Reply at 12. Indeed, the offer would not have made sense unless it was being offered to both Plaintiffs, for the offer states that its acceptance would constitute "full and final resolution of all claims made in this action." A settlement between Defendant and one of the two Plaintiffs clearly would not have resolved all the claims in this action. Moreover, after three years of litigation, Plaintiffs were not likely misled by Defendant's typo.

We reject Plaintiffs' argument as to apportionment based on the circumstances surrounding the offer: the fact that Plaintiffs alleged their claims jointly in the same complaint and the nominal nature of Defendants's offer. In adopting our position, we are persuaded by language in two unpublished consideration of Defendant's offer was not as great as it was in Behar or McDougald.

Moreover, while requiring Defendant to apportion his nominal offer would be to follow the letter of the law, it would not be true to the law's spirit. Splitting $100 between the parties would not further an offeree's evaluation of the merits of the offer. By its very nature, a nominal offer is without merit to the offeree. It says, "I think that your claim is without foundation, but I make this nominal offer of money to save myself any further aggravation or expense."

Having found Defendant's offer to be procedurally sound, we examine whether it was made in "good faith."

ii Was the offer made in "good faith"?

In § 768.79 "the legislature has created a mandatory right to attorneys fees, if the statutory prerequisites have been met." Eagleman, 673 So.2d at 947 (quoting Schmidt v. Fortner, 629 So.2d 1036, 1040 (Fla. Dist. Ct. App. 1993)). "Once the statutory prerequisites have been met, the only discretion afforded the trial court by section (7)(a) Fn10 is the authority to disallow the attorney fee award when an offer is not made in 'good faith." Id.

Plaintiffs argue essentially that Defendant's $100 offer could not have been in good faith given the

millions of dollars Plaintiffs were seeking, the amount of time, money, and effort Plaintiffs' counsel had already invested in the matter, and the fact that the Court had denied Defendant's first motion for summary judgment. Rather, Plaintiffs maintain that Defendant's offer was nothing more than a "carefully crafted, cleverly calculated, and disingenuous attempt to shift the economic burden of litigation." Stouffer Hotel Co. v. Teachers Ins., 944 F. Supp. 874, 875 (M.D. Fla. 1995), aff'd 101 F.3d 707 (11th Cir. 1996).

In an opinion issued subsequent to the cases relied upon by Plaintiffs, the District Court of Appeal of Florida, Fourth District, affirmed an offer of judgment in the amount of $100 and wrote specifically to address "nominal" offers of settlement under § 768.79. Fox v. McCaw Cellular Communications of Florida, Inc., 745 So.2d 330, 33 1 - 32 (Fla. Dist. Ct. App. 1998). In Fox, the plaintiff sued several defendants alleging that they had conspired to prevent him from getting a job with any AT&T dealer. Id. at 332. The plaintiff argued that Eagleman v. Eagleman, 673 So.2d 946 (Fla. Dist. Ct. App. 1 996), a case cited by Plaintiffs, held that all nominal offers are prima facie in bad faith. Id. Disagreeing, the court declared that Eagleman merely held that nominal offers are suspect absent an assessment by the offer or of liability and damages. Id. The court noted that "[t]he common thread running through the decisions prima facie in bad faith] is that the offerors in all of them had a reasonable basis at the time of the offer to conclude that their exposure was nominal." Id. at 333.

Plaintiffs point out that by May 11, 1999, the date of Defendant's offer, Plaintiffs had incurred many thousands of dollars in legal fees and prevailed on Defendant's first motion for summary judgment. Pltfs' Resp. at 14. These points are directed more to an

assessment by Defendant of Plaintiffs' exposure and the reasonableness of Plaintiffs ' decision not to respond to the offer than to Defendant's reasonableness in concluding, at that time, that his exposure was nominal. See, e.g., Knealing v. Puleo, 675 So.2d 593 (Fla. 1996) (noting that under § 768.79 the reasonableness of the plaintiffs rejection is irrelevant to the question of fee entitlement). Defendant replies that by May 11, 1999, the appellate court of New York had, as this Court eventually agreed, held that the Releasors had not breached their contracts. Accordingly, Defendant was reasonable in concluding that Plaintiffs could not make out their remaining claim of tortious interference, breach of contract being an essential element of that claim. Therefore, we find that Defendant's offer was made in "good faith."

C. Assessment of Defendant's reasonable costs and attorney's fees

Having found Defendant's offer procedurally valid and made in "good faith." we assess Defendant's reasonable costs and attorney's fees from the date of the filing of the offer. See Fla. Stat. §768.79(1). In determining reasonable attorney fees, the Supreme Court of Florida has adopted the federal lodestar approach. See Florida Patient 's Compensation Fund v. Rowe, 472 So.2d 1 145, 1 150 (Fla. 1985). The first step in the lodestar process requires the presiding court to determine the number of hours reasonably expended on the litigation. Id. To enable the court to assess the reasonableness of the attorney fee applicant's request, the applicant should present records detailing the amount of work performed. Id. Inadequate documentation may result in a reduction in the number of hours credited. Id.

Upon review of Defendant's motion for fees and costs and the documents attached thereto, it appears that Defendant's counsel did not submit billing records for review. Accordingly, Defendant is instructed to submit billing records in support of his claim for attorneys' fees by April 14, 2000.

2. Rule 54(d)

Unlike attorney's fees, which are substantive and thus, under Erie, governed by state law, costs are procedural and governed by Federal Rule of Civil of Procedure 54(d). See Freeman v. Package Mach. Co., 865F.2d 1331, 1348n. 13 (P'. Cir. 1988); see also Com/Tech Communication Techs., Inc. v. Wireless Data Sys., Inc., 163 F.3d 149, 150 (2d Cir. 1998); Robertson Oil Co., Inc. v. Phlll4s Petroleum Co., 14 F.3d 373, 392 (8th Cir. 1993). Fn11 Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). Pursuant to 28 U.S.C. § 1920 we tax costs in the amount of $4,799.33.

3. Conclusion

In light of the foregoing, it is hereby ORDERED AND ADJUDGED that Defendant's Verified Motion for Fees and Costs (DE#176) is GRANTED. The Court tax costs of $4,799.33. An award of attorneys' fees will be made upon review of Defendant's counsels' billing records, to be filed with the Court no later April 14, 2000.

It is further ORDERED AND ADJUDGED that Defendant's Request for Hearing (DE#177) and Plaintiffs' Emergency Motions for Protective Orders (DE#s 199 & 200) are DENIED AS MOOT. Plaintiffs'

Emergency Motion to Strike the Affidavit of Kevin J. Murray, Esq., and to Disqualify the Mediator's Law Firm From Representing Defendant Against Plaintiffs (DE#203-1 & 203-2) are DENIED. Plaintiffs' Motion to Consolidate This Motion with Defendant's Motion for Attorney's Fees is DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of April 5, 2000.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel of record

Footnotes

Fn1 Fla. Stat. § 768.79 provides, in pertinent part, as follows:

In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by him or on his behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.

Fla. Stat. §768.79(1).

Fn2 The First Circuit's holding on this issue was more specific: whereas the Tenth Circuit found that attorney's fees are substantive for diversity purposes, the First Circuit limited its finding to the attorney's fees provision before it, Puerto Rico r. Civ. P. 44.1.

Fn3 In Alyeska, the Supreme Court stated as follows:

[I]n an ordinary diversity case where the state law does not counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.

Alyeska, 421 U.S. at 259 n. 31 (quoting 6J. Moore, Federal Practice ¶ 54.77[2], at 1712 – 13 (2d ed. 1974)).

Fn4 As the parties indicate, § 45.061 has since been repealed. Nonetheless, the court's Erie analysis of §45.061 is instructive. We also note that the Tanker court examined the applicability of Fla. Stat. § 768.79, the statutory provision relevant in the matter before the Court, denying its application on grounds not pertinent here: the old version of § 768.79 did not permit courts to award prevailing defendants attorney's fees, for it only applied to a "judgment obtained by the plaintiff."

Fn5 See supra note 3.

Fn6 It should be noted that in finding the attorney's fees provision before it to be "substantive," the Boyd Rosene court relied heavily on its characterization of the provision as a "loser pays" rule. BoydRosene, 174 F.3d at 1126.

Fn7 Comment a. to § 122 provides a non-exhaustive list of issues that relate to judicial administration: the

proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs. As to many issues, it is possible to state categorically whether the local law of the forum will be applied; others, such as Defendant's request for attorney's fees based on his offer of judgment, "fall into a gray area between issues relating primarily to judicial administration and those concerned primarily with the rights and liabilities of the parties." § 122 cmt. A. For those issues falling into the gray area, the following factors are instructive: (1) Whether the issue is one to which the parties are likely to have given thought in the course of entering into the transaction; (2) whether the issue is one whose resolution would be likely to affect the ultimate result of the case; (3) whether the precedents have tended consistently to classify the issue as "procedural" or "substantive" for choice of law purposes; (4) whether an effort to apply the rules of judicial administration of another state would impose an undue burden upon the forum. Id.

Fn8 The offer states as follows:

Defendant, WILLIAM A TOTO, hereby offers pursuant to Fla. Stat. §45.061 to settle this case

Fn9 Defendant's reliance on Bodek v. Guiiver Academy, 702 So.2d 1331, 1332 (Fla. Dist. Ct. App. 1997) for the proposition that an offeror need not apportion an offer between offerees is misplaced. The version of Rule 1 .442 applicable in Guiiver Academy has since been amended and now requires apportionment. See id. at 1332 n. I.

Fn10 Fla. Stat. § 768.79(7)(a) states that "[i]f a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine

that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees." See also Fla. R. Civ. P. 1.442(h)(1).

Fn11 Professors Wright, Miller, and Kane explain this principle this way:

The award of costs is governed by federal law. There has been some suggestion that in diversity cases federal courts should look to state law as to costs, in deference to the doctrine of Erie Railroad Company v. Tompkins. With regard to ordinary items of costs, particularly those mentioned in Section 1920 of Title 28, the suggestion clearly is unsound. Variations between state and federal practice in the assessment of costs after the case has been disposed of do not appear likely to promote forum shopping or to affect 'the outcome of litigation' in any significant way and therefore employing federal law does not violate the underlying policies of the Erie principle....

10 C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure § 2669 (1983) (footnotes omitted).

00-10323-FF

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

McMahon

v.

Toto

January 7, 2003, Decided

OPINION
SUGGESTION FOR REHEARING EN BANC DENIED

00-10323-FF & 00-14729-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D. BRUCE MCMAHAN, NEMESIS VERITAS,
f.k.a. McMahan & Company,
Plaintiffs-Appellants,

versus

William A. Toto,
Defendant-Appellee.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ____F.2d___).

Before: CARNES and MARCUS, Circuit Judges, and HAND*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

ORD-42
(12/01)

CASE NO. 4D00-4297

COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

BDO SEIDMAN, LLP, f/k/a
BDO SEIDMAN, a partnership,
Appellant,

v.

BRITISH CAR AUCTIONS, INC., a corporation,
and ADT AUTOMOTIVE, INC., a corporation,
Appellees.

October 31, 2001, Opinion Filed
December 26, 2001, Rehearing Denied

Former client brought action in Florida against Tennessee accounting firm, alleging professional malpractice. The Circuit Court, Broward County, Charles M. Greene, J., entered verdict in favor of former client and awarded former client attorney fees, and accounting firm appeal. The District Court of Appeal held that malpractice suit was barred by the Tennessee statute of limitations. The Circuit Court entered judgment in favor of accounting firm and denied accounting firm's motion for fees, and accounting firm appealed. The District Court of Appeal, Klein J., held that: (1) accounting firm was not estopped from changing its position regarding whether Tennessee or Florida law applied to its motion for fees, and (2) Florida statute authorizing award of attorney fees applied.

Reversed and remanded

Gross, J., filed a specially concurring opinion.

Polen, C.J., filed a dissenting opinion.

Estoppel k68(2)
156k68(2)

Accounting firm was not estopped from changing its position regarding whether Tennessee or Florida la applied to its motion seeking attorney fees from former client; neither side was prejudiced by the change, as both parties had an equal opportunity and similar difficulty in attempting to find the answer to the question of first impression, and the change in position involved only a question of law. (Per opinion of Klein, J., with one Judge concurring specially.) West's F.S.A. § 768.79.

Accountants k10.1
11 Ak10.1

Florida statute authorizing the award of attorney fees to accounting firm applied in action by former client, although accounting firm was a Tennessee resident and the trial court applied Tennessee law to the cause of action; statute applied to all civil actions for damages brought in Florida, regardless what state's substantive law applied. (Per opinion of Klein, J., with one Judge concurring specially.) West's F.S.A. §768.79

Constitutional Law k70.3(3)
92K70.3(3)

Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review; the courts have no veto power, and do not assume to regulate state

policy, buy they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law. (Per opinion of Klein, J., with one Judge concurring specially.)

COUNSEL: Daniel S. Pearson, and Lenore C. Smith of Holland & Knight, LLP, Miami, for appellant.

Timothy J. McDermott, and J. Riley Williams of Akerman, Senterfitt & Eidson, P.A., Jacksonville, and Paul R. Regensdorf of Akerman, Senterfitt & Eidson, P.A., Fort Lauderdale, for appellee British Car Auctions, Inc., a corporation.

JUDGES: KLEIN, J., GROSS, J., concurs specially with opinion. POLEN, C.J., dissents with opinion.

OPINION BY: KLEIN

OPINION:

KLEIN, J.

The issue in this case is whether Florida's offer of judgment statute can be utilized in a case arising in Tennessee but litigated in Florida under Tennessee substantive law. We conclude that this should not be resolved under conflict of laws principles, and that the statute applies in this case.

British Car Auctions received tax advice in Tennessee from BDO Seidman, LLP, an accounting firm, and sued Seidman for professional malpractice in Florida. Prior to trial, each party made an offer of judgment pursuant to section 768.79, Florida Statutes (1991), but neither offer was accepted. A jury found Seidman to have been

negligent and awarded damages of $ 3,200,662. British Car was awarded attorney's fees under section 768.79, and Seidman appealed both the damages and fees.

Applying Tennessee law, which the parties agreed governed, we held that the malpractice suit was barred by the Tennessee statute of limitations. BDO Seidman, LLP v. British Car Auctions, Inc., 745 So. 2d 1082 (Fla. 4th DCA 1999). n1 We reversed for entry of judgment in favor of Seidman without reaching the issue of attorney's fees, which had become moot.

Following the mandate, the trial court entered judgment in favor of defendant Seidman, and Seidman moved for attorney's fees under its section 768.79 offer of judgment. Acknowledging that it had taken a different position on the prior appeal, Seidman said that it had been mistaken when it argued that Tennessee law controlled the issue of attorney's fees. Ruling that Tennessee law "preempts" Florida law on the issue of fees, the trial court denied Seidman's motion, and Seidman appeals.

We first address British Car's argument that Seidman was estopped from changing its position and seeking fees under section 768.79. Both parties made offers of judgment pursuant to the statute and, at different times in the litigation, each party changed its position on the applicability of it. Neither side has been prejudiced by the other's change of position, which involved only a question of law. Both parties had equal opportunity, and similar difficulty, in attempting to find the answer to what was a question of first impression. There was accordingly no estoppel. See Metropolitan Dade County v. Jones Boatyard, Inc., 611 So. 2d 512, 514 (Fla. 1993); Chase & Co. v. Little, 116 Fla. 667, 156 So. 609, 611 (Fla. 1934); Palm Beach County v. Palm Beach Estates, 110

Fla. 77, 148 So. 544, 548 (Fla. 1933); Rafkind v. Simon, 402 So. 2d 22, 24 (Fla. 3d DCA 1981).

Proceeding to the merits, Seidman and British Car both rely on a conflict of laws analysis. Seidman's reasoning reaches the result that section 768.79 is procedural and therefore applies. British Car's argument is that the statute is substantive and should not be applied to this out-of-state cause of action.

Section 768.79(1), Florida Statutes (1991), applies to "any civil action for damages filed in the courts of this state." (emphasis supplied.) This statute is clear, and on its face is applicable to this action for damages. It is also constitutional. See TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995). We conclude that, because the statute is clear, it should be applied without engaging in a conflict of laws analysis.

As the Florida Supreme Court explained in City of Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, 772 (Fla. 1914):

Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy, but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

Choice of law considerations, where laws of different states or nations are involved, involve public policy decisions. Restatement (Second) of Conflict of Laws § 6 (1971). In Hartford Accident & Indemnity Co. v. City of

Thomasville, Ga., 100 Fla. 748, 130 So. 7, 8 (Fla. 1930), the Florida Supreme Court explained:

The extent and scope to which the rule of comity will operate is not universal, but will be determined by each sovereignty under the controlling facts of the particular case. It does not require a court to enforce rights given by the statutes of another state to the prejudice of its own citizens, or when complete justice cannot be done, nor will the courts of one state enforce laws of another state which are repugnant to its own or to public policy.

When the Legislature enacted section 768.79, it was making a policy determination that attorney's fees should be recoverable under certain circumstances. The Florida Bar Re Amendment to Rules of Civil Procedure, 550 So. 2d 442 (Fla. 1989). Implicit in that policy determination was the decision that the statute would apply to "any" civil action for damages.

If we were to engage in a conflict of laws analysis, which would involve applying other policies, it would, if we held the statute not applicable, violate the principle that a policy decision of a court "must yield to a valid, contrary legislative pronouncement." VanBibber v. Hartford Acc. & Indem. Ins. Co., 439 So. 2d 880, 883 (Fla. 1983). See also Brown v. Case, 80 Fla. 703, 86 So. 684 (Fla. 1920)(in the absence of a statute to the contrary, conflict of law principles, based on public policy will be applied to determine whether the law of the forum state or the law of the state where the cause of action accrued will be applied).

No Florida court, so far as our research indicates, has applied a conflicts of law analysis in order to determine whether a statute, which is clear and constitutional, should be applied. In Weatherby Associates, Inc. v.

Ballack, 783 So. 2d 1138, 1143 (Fla. 4th DCA 2001), the issue was whether a court could assess attorney's fees for bringing a frivolous lawsuit, under section 57.105(1), Florida Statutes (1999), in a case in which Connecticut substantive law applied. Without engaging in a conflict of law analysis, we concluded that the statute applied because the plaintiff "filed and pursued a baseless lawsuit in a Florida court."

Our view that conflict principles should not be applied where the statute is clear is supported by the Restatement (Second) of Conflict of Laws § 6, cmt. b. (1971), in which it is stated:

The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid. On the other hand, if the legislature intended that the statute should be applied only to acts taking place within the state, the statute should not be given a wider range of application. . . . Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles. [emphasis supplied.]

Section 6 of the Restatement (Second) was relied on by the Florida Supreme Court in Bishop v. Florida Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980).

Our conclusion that section 768.79 applies to all civil actions for damages brought in Florida courts is consistent with the legislative intent, which is to reduce

litigation. Aspen v. Bayless, 564 So. 2d 1081, 1083 (Fla. 1990). An action for damages based on the substantive law of another jurisdiction has the same impact on the Florida court system as one based on the substantive law of Florida.

We acknowledge that the eleventh circuit has recently held that section 768.79 is substantive under Florida conflict of laws principles. McMahan v. Toto, 256 F.3d 1120 (11th Cir. 2001). This decision is persuasive, but not binding on us. State v. Dwyer, 332 So. 2d 333 (Fla. 1976). We respectfully disagree with it. See Judge Gross' concurring opinion.

We therefore reverse and remand for the trial court to award attorney's fees to Seidman under its section 768.79 offer of judgment.

GROSS, J., concurs specially with opinion.

POLEN, C.J., dissents with opinion.

CONCUR BY: GROSS

CONCUR: GROSS, J., concurring specially.

I concur with Judge Klein's opinion. I write separately to note that even under a choice of law analysis, Seidman is entitled to recover fees under section 768.79, Florida Statutes (1991). n2 This is so because the offer of judgment statute is "procedural" under Florida choice of law terminology; it is part of the machinery of Florida's judicial process that promotes judicial economy.

British Car's main argument is straightforward. "Tennessee law governs substantive matters in this dispute; Florida law controls procedural issues only."

Tennessee law does not allow a prevailing party to recover attorney's fees; the Florida supreme court has described the right to attorney's fees under section 768.79 as "substantive." See Knealing v. Puleo, 675 So. 2d 593, 596 (Fla. 1996) (stating that section 768.79 contains "substantive provisions authorizing an award of attorney [sic] fees"); TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995) ("The legislature has modified the American rule, in which each party pays its own attorney's fees, and has created a substantive right to attorney's fees in section 768.79."). Seidman agrees that "Tennessee law unquestionably governs the substantive issues because of Tennessee's significant relationship to the dispute," but asserts that the issue of its entitlement to fees is a "separate, procedural issue . . . governed by Florida law."

The difficulty in this case arises because two bodies of law - Florida constitutional law and choice of law - use the same "substantive/procedural" terminology.

In the cases cited by British Car, the supreme court was considering the division of power between that court and the legislature under Article V, section 2(a), of the Florida Constitution. Section 2(a) provides that the "supreme court shall adopt rules for the practice and procedure in all courts." Id. That provision endows the supreme court "with exclusive authority to adopt rules for practice and procedure in the courts of this State." Dvorak, 663 So. 2d at 611.

In cases like Knealing, Dvorak, Timmons v. Combs, 608 So. 2d 1 (Fla. 1992), and Leapai v. Milton, 595 So. 2d 12 (Fla. 1992), the supreme court addressed constitutional challenges to offer of judgment statutes n3 under Article V, section 2(a). The court's characterization of the statutory right to attorney's fees as "substantive" in

those cases was an acknowledgment of the legislature's constitutional power to enact the statute, not a determination that the statute was "substantive" for all legal purposes. The values informing choice of law principles are different than those underlying an Article V separation of powers issue. Therefore, what is substantive or procedural for Article V purposes is not necessarily substantive or procedural for choice of law purposes. See Sun Oil Co. v. Wortman, 486 U.S. 717, 726, 100 L. Ed. 2d 743, 108 S. Ct. 2117 (1988) (rejecting the concept that "there is an equivalence between what is substantive under the Erie [Railroad Co. v. Tompkins], 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938) doctrine and what is substantive for purposes of conflict of laws").

As one commentator has observed:

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs through all legal discussions. It has the tenacity of original sin and must be constantly guarded against.

COOK, THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS, § 159 (1942) (quoted in EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 3.3 n.3 (2d ed. 1992)). The Restatement (Second) of Conflict of Laws has abandoned "procedural" and "substantive" labels, observing that the characterizations "while harmless in themselves, have led some courts into unthinking adherence to precedents that have classified a given issue as 'procedural' or 'substantive,' regardless of what purposes were involved in the earlier classifications." Id. at § 122, cmt. b. Instead of classifying issues as procedural or substantive, the rules of the

Restatement "face directly the question of whether the forum's rule should be applied." Id.

In a choice of law context, Florida maintains the traditional distinction between substantive and procedural matters. See Prestige Rent-A-Car, Inc. v. Advantage Car Rental & Sales, Inc., 656 So. 2d 541, 544 n.2 (Fla. 5th DCA 1995); Aerovias Nacionales de Colombia, S.A. v. Tellez, 596 So. 2d 1193, 1195 (Fla. 3d DCA 1992); Guirlinger v. Goldome Realty Credit Corp., 593 So. 2d 1135, 1136 n.1 (Fla. 1st DCA 1992). As the forum state in this case, Florida law determines whether section 768.79 is substantive or procedural for choice of law purposes. See Fahs v. Martin, 224 F.2d 387, 397, 401 n.6 (5th Cir. 1955); Smithco Eng'g, Inc. v. Int'l Fabricators, Inc., 775 P.2d 1011, 1017-18 (Wyo. 1989). Usually,

a court will apply foreign law only to the extent that it deals with the substance of the case, i.e., affects the outcome of the litigation, but will rely on forum law to deal with the "procedural" aspects of the litigation.

SCOLES & HAY, CONFLICT OF LAWS § 3.8 (2d ed. 1992) (footnotes omitted); see Colhoun v. Greyhound Lines, Inc., 265 So. 2d 18, 20 (Fla. 1972). Substantive law generally "relates to the cause of action's rights and duties, whereas procedural law involves 'the machinery for carrying on the suit.'" Smithco Eng'g, 775 P.2d at 1018 (quoting Roth v. Roth, 571 S.W.2d 659, 672 (Mo. App. 1978) (quoting Shepherd v. Consumers Co-op. Ass'n, 384 S.W.2d 635, 639, 642 (Mo. 1964))).

To decide whether section 768.79 is substantive or procedural for choice of law purposes, it is helpful to consider those factors the Restatement identifies as pertinent to classifying an issue for choice of law

purposes. Florida courts have often relied upon the Restatement to decide conflict of law matters. See, e.g., Bishop v. Fla. Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980); Aetna Cas. and Sur. Co. v. Huntington Nat'l Bank, 587 So. 2d 483, 485-86 (Fla. 4th DCA 1991). Section 122 provides:

A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122. "The forum is more concerned with how its judicial machinery functions and how its court processes are administered than is any other state." Id. at cmt. a.

Florida cases have identified the legislative objectives behind section 768.79. All pertain to how Florida's "judicial machinery functions."

The purpose of section 768.79 is to lead "litigants to settle by penalizing those who decline offers that satisfy the statutory requirements." MGR Equip. Corp., Inc. v. Wilson Ice Enters., Inc., 731 So. 2d 1262, 1264 (Fla. 1999); see Aspen v. Bayless, 564 So. 2d 1081, 1083 (Fla. 1990) (stating that "purpose and intent" of section 768.79 is "to encourage parties to settle claims without going to trial"). Encouraging settlement lowers litigation costs for the parties and reduces the fiscal impact of litigation on the court system. See Allstate Ins. Co. v. Materiale, 787 So. 2d 173, 176 (Fla. 2d DCA 2001) (Casanueva, J., concurring) (indicating that "the main purpose of section 768.79" is "to encourage resolution of disputed claims without the unnecessary consumption of scarce judicial resources"); Pirelli Armstrong Tire Corp. v. Jensen, 752 So. 2d 1275, 1277-78 (Fla. 2d DCA 1999)

(Casanueva, J., concurring in part, dissenting in part). The statute penalizes parties who "fail to act reasonably and in good faith in settling lawsuits." Eagleman v. Eagleman, 673 So. 2d 946, 947 (Fla. 4th DCA 1996); accord Goode v. Udhwani, 648 So. 2d 247, 248 (Fla. 4th DCA 1994). Early settlement of a case frees court time for the many other cases waiting to be heard.

Whether this lawsuit expended Florida's judicial resources is not a concern of Tennessee. The primary interest of section 768.79 is, in the words of the Restatement, how Florida's "judicial machinery functions." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122, cmt. a. In this case, a more realistic assessment of risk under the statute of limitations might have encouraged an early settlement instead of a lengthy jury trial and two appeals. Not to apply section 768.79 in this type of case would "impose an undue burden upon" Florida. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122, cmt. a. Lawsuits that arose elsewhere could willy-nilly consume Florida's judicial resources, while purely Florida cases would be subject to the penalty provisions of section 768.79. Jurisdictions with court dockets less crowded than Florida's might not share the value that early settlement of a case is a "consummation Devoutly to be wished." W. SHAKESPEARE, HAMLET, Act III, Scene I.

Application of section 768.79 to this case is consistent with the broad wording of subsection (1), which declares that it applies "in any civil action for damages filed in the courts of this state." (Italics supplied). Significantly, the legislature did not limit the statute to cases "arising" or "accruing" in Florida, or to cases controlled by Florida substantive law. The plain meaning of the statute supports its use in this case.

Two other Restatement factors bolster the conclusion that section 768.79 should apply here. The offer of judgment statute is not "one to which the parties [were] likely to have given thought in the course of entering" into the accountant-client relationship. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. a. Parties to a contract "do not usually place reliance on the applicability of the rules of a particular state to issues that would arise only if litigation should become necessary." Id. Also, the offer of judgment statute was not "likely to affect the ultimate result of the case." Id. Section 768.79 comes into play only after the determination of the "ultimate result."

Under the terminology of the Florida cases, the offer of judgment statute is a matter of procedural law for choice of law purposes. Section 768.79 is a part of Florida's "judicial machinery." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122, cmt. a. It is a "procedural device for promoting judicial economy." Paine Webber Jackson & Curtis, Inc. v. Winters, 22 Conn. App. 640, 579 A.2d 545, 553 (Conn. App. 1990) (using Connecticut offer of judgment statute to penalize defendant for wasting Connecticut's judicial resources). British Car could have avoided the operation of the statute by bringing suit in Tennessee.

This case is similar to Weatherby Associates, Inc. v. Ballack, 783 So. 2d 1138 (Fla. 4th DCA 2001). An issue in Weatherby was whether a court could assess attorney's fees under section 57.105(1), Florida Statutes (1999), in a lawsuit arising out of an employment agreement that provided for Connecticut law to apply to any such litigation. Section 57.105(1) permits the award of attorney's fees where the action is frivolous, where there is a total lack of justiciable issues of either law or

fact. See, e.g., Muckenfuss v. Deltona Corp., 508 So. 2d 340, 341 (Fla. 1987).

Weatherby held that the award of fees under section 57.105(1) was proper, "because Weatherby filed and pursued a baseless lawsuit in a Florida court." Weatherby, 783 So. 2d at 1143. Implicit in this ruling is the finding that section 57.105(1) fees were "procedural" for choice of law purposes, so that a Florida court could properly apply it in the interest of justice and efficient judicial administration. This court rejected Weatherby's argument that such fees should not be awarded because Connecticut's law governed the substantive issues in the case.

Both sections 57.105(1) and 768.79 impose sanctions for certain conduct occurring during litigation. Section 57.105(1) is akin to a court's inherent power to sanction litigants who act in bad faith or otherwise abuse the judicial process. See Patsy v. Patsy, 666 So. 2d 1045, 1047 (Fla. 4th DCA 1996). Numerous cases have described the offer of judgment statute as being "punitive." See, e.g., Schussel v. Ladd Hairdressers, Inc., 736 So. 2d 776, 778 (Fla. 4th DCA 1999) (describing section 768.79 as "punitive in nature"). As Seidman argues, the goals of the two statutes are the same - to ease the burden on Florida courts by preventing frivolous lawsuits, on the one hand, or preventing unreasonable assessments of their worth, on the other. Weatherby therefore supports the holding in this case.

British Car argues that Clayton v. Bryan, 753 So. 2d 632 (Fla. 5th DCA 2000), and Moran v. City of Lakeland, 694 So. 2d 886 (Fla. 2d DCA 1997) are controlling, but they are distinguishable. Both cases involve specific attorney's fee provisions in federal statutes that preempted section 768.79 under the supremacy clause

of the United States Constitution. Such cases involve policies not present when considering a choice of law issue in a case where Florida has an offer of judgment statute and Tennessee does not.

Moran involved a suit under 42 U.S.C. § 1983. The applicable federal statute authorizes fees to a prevailing defendant "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." Moran, 694 So. 2d at 886-87 (quoting Hensley v. Eckerhart, 461 U.S. 424, 429 n.2, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)). This limitation on a defendant's ability to recover fees implements Congress's intent to encourage citizens to seek redress for violation of their rights. To allow section 768.79 to override the federal statute would have a chilling effect on the bringing of civil rights lawsuits, contrary to the intent of Congress.

Clayton concerned a suit brought under the Federal Fair Debt Collection Practices Act. That statute provides that fees are to be awarded to a prevailing defendant only when the court expressly finds that the plaintiff's case was "brought in bad faith and for the purpose of harassment." Clayton, 753 So. 2d at 633. By this section, Congress leveled the playing field between debtors and creditors. To apply section 768.79 to a case brought under the Act would create the obstacles to bringing suit which Congress expressly sought to avoid.

Recently, the eleventh circuit has held that section 768.79 is substantive under Florida choice of law principles. See McMahan v. Toto, 256 F.3d 1120, 1132 (11th Cir. 2001). That ruling is not binding on this court. See Pignato v. Great Western Bank, 664 So. 2d 1011, 1015 (Fla. 4th DCA 1995). n4 To reach its conclusion, the eleventh circuit relied primarily on the Article V cases, such as Dvorak and Timmons, an approach which is

incorrect for the reasons set forth above. Also, the eleventh circuit wrote that the statute "is properly viewed as a type of 'loser pays' rule or standard." McMahan, 256 F.3d at 1134. This pigeonholing of section 768.79 gives inadequate emphasis to the statute's primary purpose of encouraging reasonable settlements. Under the statute, a plaintiff who obtains a judgment may still be responsible for fees if the amount of the judgment is twenty-five percent less than a defendant's offer of judgment.

DISSENTBY: POLEN

DISSENT: POLEN, C.J., dissenting.

I believe the trial court correctly denied attorney's fees, and for that reason, I would affirm. To me, the resolution is much simpler than the majority and concurring opinions make it out to be.

While Judge Gross's well-reasoned concurring opinion spends much effort justifying section 768.79 as being procedural rather than substantive, and rejecting the Eleventh Circuit's contrary conclusion in McMahan v. Toto, 256 F.3d 1120, 1132 (11th Cir. 2001), to me this statute is both procedural and substantive. But we are not here concerned with the procedural aspect. Whether or not the statute may be deemed "punitive" or a "sanction," the departure from common law principles n5 which allows a court to require one party to pay some of the attorney's fees of the other party (outside the section 57.105 context, with which I am inclined to agree with Judge Gross) makes this a substantive provision.

I agree with that part of the majority's opinion which declares section 768.79 is not unconstitutional, as

applied or otherwise. I further agree that Seidman is not estopped from changing its position that section 768.79 should now apply. But the absence of estoppel does not mean we are obligated to accept Seidman's argument. In Seidman I, both parties stipulated that Tennessee law applied to this litigation. As the majority points out, both sides had made offers of judgment under the statute, yet neither side argued in the prior appeal that Tennessee law applied only to the merits. The reasoning of the trial judge here, that Tennessee law did not have a comparable offer of judgment statute, so no attorney's fees could be awarded, should be affirmed. For these reasons, I respectfully dissent.

Footnotes

n1 Florida's borrowing statute, section 95.10, Florida Statutes (1999), provides that a cause of action will be barred in this state if it is barred in the state where it arose "because of lapse of time."

n2 Because the underlying cause of action in this case accrued in 1992, the 1991 offer of judgment statute applies. See Twiddy v. Roca, 677 So. 2d 387, 388 (Fla. 2d DCA 1996).

n3 Leapai v. Milton, 595 So. 2d 12 (Fla. 1992), ruled on the constitutionality of section 45.061, Florida Statutes (1987).

n4 It appears that a Florida court's ruling on state law may be binding on federal courts, even where such a ruling specifically contradicts an earlier interpretation of the same law by the eleventh circuit. See Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1451 (11th Cir. 1991); Nussbaum v. Mortgage Serv. Am. Co., 913 F. Supp. 1548, 1554 (S.D. Fla. 1995).

n5 See Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985).

WEST'S FLORIDA STATUTES ANNOTATED
TITLE XLV. TORTS
CHAPTER 768. NEGLIGENCE
PART 11, DAMAGES

Current through End of 1999 Pt Reg. Sess.

768.79. Offer of judgment and demand for judgment

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more that the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiffs award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(4) an offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

0(5) an offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

(6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiffs at least 25 percent less than the amount of the

offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term 'judgment obtained" means the amount of the net judgment entered, plus any post offer collateral source payments received or due as of the date of the judgment, plus any post offer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any post offer settlement amounts by which the verdict was reduced.

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1 . The then apparent merit or lack of merit in the claim.

2. The number and nature of offers made by the parties.

3 . The closeness of questions of fact and law at issue.

4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

(8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

TITLE 6. CIVIL PRACTICE AND PROCEDURE
CHAPTER 59. APPELLATE PROCEEDINGS

Fla. Stat. § 59.46 (2002)

§ 59.46. Attorney's fees

In the absence of an expressed contrary intent, any provision of a statute or of a contract entered into after October 1, 1977, providing for the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees to the prevailing party on appeal.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 00-10323
CASE NO. 00-14728
CASE NO. 00-14990

USDC CASE NO. 96-8294

NEMESIS VERITAS, L.P., f/k/A
MCMAHAN & COMPANY and
D. BRUCE MCMAHAN
Appellants,

v.

WILLIAM A. TOTO,
Appellee.

TOTO'S PETITION FOR APPELLATE
FEES AND COSTS
-AND -
MOTION FOR DIRECTIONS
-WITH-
VERIFIED BILL OF FEES, COSTS AND
SUPPORTING AFFIDAVIT
-AND -
CERTIFICATE OF INTERESTED PERSONS

Appellee, William A. Toto, petitions this Court pursuant to Davidson v. City of Avon Park, 848 F.2d 172 n.4 (11th Cir. 1988), Fla. Stat. § 768.79 and Fed. R. App. P. 39 for the attorney's fees and costs occasioned by these consolidated appeals, and says:

Motion for Fees and Costs

1. On July 10, 2001, this Court affirmed the District Court's summary judgment, disposing of a total claim for $90 million against Mr. Toto.

2. On November 6, 2002, this Court affirmed Mr. Toto's entitlement to fees pursuant to Florida's Offer of Judgment statute, Fla. Stat. § 769.79, affirmed the bulk of the District Court's award of fees and ordered the case remanded to the District Court to assess some relatively minor downward adjustments.

3. Given the November 6, 2002 opinion, the time is now ripe for us to submit a petition for the fees and costs occasioned by these appeals.

4. We attach hereto, a Verified Bill of Fees and Costs and a supporting expert affidavit from Kevin J. Murray, Esq., as well as the required Certificate of Interested Persons.

5. This Court is empowered to grant attorney's fees incurred in the appellate process. Davidson v. City of Avon Park, 848 F.2d 172 n.4 (11th Cir. 1988).

6. This Court should award appellate fees when, under state law, the party is entitled to appellate fees. Steelmet v. Caribe Towing Corp., 842 F.2d 1237, 1245 (11th Cir. 1988).

7. All five Florida District Courts of Appeal of Florida have held that the fees recoverable under Fla. Stat. § 768.79 include the attorney's fees and expenses of any appeal. Westerfield Ins. Co. v. Mendolera, 647 So.2d 223 (Fla. 2d DCA 1994); Mark C. Arnold Constr. Co. v. National Lumber Brokers, Inc., 642 So.2d 576 (Fla. 1st DCA 1994); Schmidt v. Fortner, 629 So.2d 1036, 1043

n.10 (Fla. 4th DCA 1993); Williams v. Brochu, 578 So.2d 491, 495 (Fla. 5th DCA 1991); Lantigua v. Lopes, 692 So.2d 532, 533 (Fla. 3d DCA 1997).

8. "Reasonable costs" are also recoverable under Fla. Stat. § 768.79. This is a broader classification than the "taxable costs" referred to in Fed.R.App.P. 39 and 11th Cir. R. 39-1. We therefore seek the LEXIS charges, courier costs and other expenses incurred on our client's behalf

9. As this Court observes in its recent Order, Florida law does not ordinarily entitle a litigant to the fees and costs incurred in litigating the amount of attorney's fees — i.e. "fees for fees" - as opposed to the threshold question of entitlement.

10. Florida case-law is not clear, however, that appellate "fees for fees" work is not compensable. Still less is it clear that Florida courts would consider such work to be non-compensable when, as here, the majority of that work was occasioned by a barrage of baseless objections. As the District Court observed:

Over the span of 31 pages, Plaintiffs challenge Defendant's billing records at every turn, practically line by line. Meritorious arguments are often buried beneath or embedded within non-meritorious ones. While it is Plaintiff's counsels' prerogative to exhaustively defend their clients interests, their approach threatens to turn our determination of fees and costs to award into a separate litigation.

District Court Order, August 21, 2000. (R.1-232)

As this Court concurred:

Many of these born-again contentions are not sufficiently viable to warrant discussion because they either are so clearly without merit, or they are without merit and are of insufficiently general application, to warrant discussion in a published opinion.

11th Circuit Order, November 6, 2002.

11. The Florida rule regarding "fees for fees" is to discourage protracted fee fights over the amount of fees by the applicant. Here we have a situation, however, where there has been a protracted fee fight engendered by the opponent through pointless objections. In light of the Florida policy of discouraging protracted litigation over fees, we suggest that "fees for fees" should be excluded from the award only to the extent that the dispute was founded on reasonably debatable objections. We suggest that the overall reduction be no more than the 10% suggested in our Verified Bill.

12. In line with the Verified Bill and supporting affidavit, we therefore request no less than $103,901.14 to reimburse Mr. Toto for his fees and costs while this matter has been on appeal.

Motion for Directions

13. As reflected on the exhibits to the Verified Bill, there were continuing proceedings in the District Court regarding a supersedeas bond, a stay and other matters while these consolidated appeals were pending. Fees for both the additional District Court work and the Circuit Court work are due under Fla. Stat. § 769.79.

14. We have not sought to separate the additional fees for the District Court work from the fees for strictly Circuit Court work. This Court may prefer to make an

award of appellate fees and leave it to the District Court to make that additional award of District Court fees when this case is remanded for the "fine-tuning" mandated by this Court's November 6, 2002 opinion. Alternatively, this Court may prefer to rule on the appellate entitlement issue only, direct the District Court to determine an appropriate fee for District and Circuit Court work, or some combination of the foregoing: the discretion exists. Davidson, 848 F.2d at 174 n.4.

WHEREFORE, Appellee, Mr. Toto, asks that this Court award him the reasonable appellate attorney's fees and costs detailed in his Verified Bill of Fees and Costs and direct if it wishes that he segregate District Court fees and costs from Circuit Court fees and costs.

Respectfully submitted,
ABALLI MILNE, KALIL & ESCAGEDO F.A.
2250 SunTrust International Center
One Southeast Third Avenue
Miami, Florida 33131
Ph: (305) 373-6600
Fax: (305) 373-7929

Hendrik G. Milne
Florida Bar No. 335886

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Richard A. Beiley, Esq., One Biscayne Tower, Suite 2600, 2 South Biscayne Boulevard, Miami, Florida 33131-1802 and sent by Federal Express to Patti E. Evans, Esq., Isaacs & Evans, LLP, 10 E. Street, New York, New York 10016, on this 16th day of November, 2002.

Hendrik G. Milne

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No.: 00-10323
Case No.: 00-14728
Case No.: 00-14990

USDC Case No. 96-8294

NEMESIS VERITAS, L.P., f/k/a
McMAHAN & COMPANY
and D. BRUCE McMAHAN,

Appellants,

v.

WILLIAM A. TOTO,

Appellee.

VERIFIED BILL OF FEES AND COSTS

I, Hendrik G. Milne, do declare under penalty of perjury as follows:

1. I am the attorney who had the prime responsibility for the representation of Mr. Toto in the trial and appellate proceedings in this case.

2. Any statements of fact made herein are stated upon personal knowledge. To the extent that I express any opinion herein, it is based upon reasonable probability within my knowledge and experience as an attorney specializing in commercial litigation and is submitted as being admissible within the scope of Fed. R. Evid. 702.

3. I graduated with an LL.B (with honors) from Manchester University, England, in 1975. I thereafter attended the College of Law in London in 1976, was admitted to the Bar of England and Wales at the Honorable Society of Middle Temple in 1977 and completed pupilage as a barrister at Lincoln's Inn and Middle Temple in 1978.

4. In 1980, I gained a J.D. (cum laude) from the University of Miami in Florida and was admitted to the Florida Bar in 1981. I was thereafter admitted to the bar of the U.S. District Court, Southern District of Florida, in 1982; the U.S. Claims Court in 1982; the U.S. Court of Appeals, Eleventh Circuit, in 1983; the U.S. District Court, Southern District of Florida (Trial Bar), in 1984; the U.S. District Court, Middle District of Florida, in 1985; the U.S. Court of Appeals, Ninth Circuit, in 1992; the U.S. Bankruptcy Court, Southern District of Florida, in 1994; the U.S. District Court, Northern District of Florida, in 2002.

5. Over the years I have, further, been admitted pro hac vice in various state and federal, trial and appellate courts in Arizona, California, D.C., Florida, Georgia, Hawaii, New Hampshire, New Jersey, New York and Ohio.

6. Until 1982, I practiced with the Miami firm of Anderson & Moss. From 1982 until 1993, I practiced commercial litigation in the Miami office of the large, Cleveland-based law firm, Squire, Sanders & Dempsey. For roughly the last three of those years I was an equity partner in that firm and, latterly, as the firm's overseas offices expanded, the head of the firm's International Litigation and Arbitration Section.

7. In 1993, I and several colleagues from Squire Sanders' Miami office left on friendly terms and formed our own firm - Aballí Milne Kalil & Escagedo, P.A. (f/k/a Aballí Milne Kalil & Garrigó, P.A.) - where I specialize in complex commercial litigation, particularly involving international or multi-state issues. I am rated "AV" by Martindale-Hubbell and my firm is in Martindale-Hubble's Bar Register.

8. Mr. Toto came to me on a recommendation from one of my ex-partners in Squire, Sanders' Cleveland office, in the Fall of 1997 and I had the prime responsibility for his representation in the trial and appellate proceedings herein.

9. There were two major issues before this Court on these consolidated appeals: (1) whether, as we had persuaded the District Court, MBM and McMahan were collaterally estopped on their claim against Mr. Toto for $30 million in compensatory damages and $60 million in punitive damages; and (2) whether Mr. Toto was entitled to fees under Florida's Offer of Judgment statute, Fla. Stat. § 768.79. Mr. Toto has now finally prevailed on these issues and, under Florida law, is entitled to his appellate fees.

10. Our billing records through April 11, 2000 were submitted to the District Court and formed part of the fee award below. I attach copies of the subsequent billing narratives as to fees and expenses, labeled Exhibits "A" through "K."

11. A summary of the charges is attached in table form as Exhibit "H."

12. The narratives predominantly detail work done in this Court, though some charges (such as relating to the

supersedeas bond and motion for stay, etc.) relate to continuing issues in the District Court. I have not attempted to segregate the District Court charges from the charges for time before this Court, pending further direction, since whichever Court should assess them, all such charges are recoverable.

13. I personally prepared the bills to our client and exercised billing discretion as to whether to list time actually spent at all and, if listed, whether it should be charged. Typically, if I considered the time to have been of doubtful utility to the client, I would not list or charge it. If I considered the time to have been primarily useful to myself - and thus of some utility to the client - but, in my judgment, perhaps excessive in relation to the particular purpose to be served, I might choose to list the time but make no charge.

14. I have made some minimal redactions to the attachments to avoid the disclosure of attorney-client communications; matters that may have some continuing work-product relevance; or matters separate from this litigation or not otherwise pertinent to this fee and expense application. I believe that it is reasonably apparent where such redactions have been made. Where the redaction appears to need specific comment, I make such.

15. In these records, timekeepers identified by initial are: HGM, myself, $300 per hour; SMG, Silvia M. Garrigó, (Florida Bar admission 1987), $240 per hour; CPK, Craig P. Kalil, (Florida Bar Admission 1986) $250 per hour; AVF, Anthony V. Falzon, (Florida Bar admission 1995) $165 per hour; MBD, Marlene B. Danger (Florida Bar admission 1998), $140 per hour; CO, Carlos F. Osorio, as law clerk, $50 per hour; after admission to Florida Bar, 2002, $110 per hour; JH/FRM, John Hughson, law clerk,

$50 per hour; CGD, law clerk, $60 per hour; JB, Janet Betancourt, paralegal, $50 per hour.

16. I note that it is not our practice to charge for in-house photocopies, faxes, postage or other such items that many other law firms pass on to their clients. These items of expense are included as part of the service charged for in our hourly rates. We do charge for LEXIS and for other out-of-pocket costs charged to us by third parties, such as FedEx courier charges.

17. The Exhibits are as follows:

(a) Exhibit "A" represents time and charges billed on June 16, 2000. HGM was charged out for 72.25 hours at $300 per hour, totaling $21,675.00. AVF was charged out for 20.25 hours at $165 per hour, totaling $3,341.25. MBD was charged out for 3.50 hours at $140 per hour, totaling $3,341.25. (No charge was made for 1 hour of SMG's time at $240 or 0.50 of MBD's time at $140, which would otherwise have totaled $310.00. No claim is made for the expense listed as Shorecrest Investigations for $456.78). Total fees for this period are therefore $25,556.25. Total expenses plus advances are $500.21.

(b) Exhibit "B" represents time and charges billed on August 15, 2000. HGM was charged out for 25.75 hours for work related to this matter at $300 per hour, totaling $7,725.00. (The narrative on page 2 and 3 for additional charges to the client for 25 hours of HGM's time relate to other matters and are not claimed). Total fees for this period are therefore $7,725.00. Total expenses plus advances are $649.39.

(c) Exhibit "C" represents time and charges billed on December 14, 2000. HGM was charged out for

84.25 hours at $300 per hour, totaling $25, 575.00. JHM was charged out for 128 hours at $50 per hour, totaling $6,400. MBD was charged out for 5.50 hours at $140 per hour, totaling $770.00. (The entry on October 16, 2000 for HGM [1 hour] and JH [1 hour] for which "no charge" was intended appears to have been charged in error. Those amounts are not claimed here). No claim is made for the expense listed as Shorecrest Investigations for $456.78. Total fees for this period are therefore $32,445.00. Total expenses plus advances are $614.50.

(d) Exhibit "D" represents time and charges billed on April 18, 2001. HGM was charged out for 58 hours at $300 per hour, totaling $17,400.00 JHM was charged out for 41 hours at $50 per hour, totaling $2,050.00 MBD was charged out for 7 hours at $140 per hour, totaling $980. (No charge was made for 18 hours of JMH's time at $50 per hour for a total of $900. A further 9 hours of JMH's time at $50, for a total of $450, listed as "no charge" appears to have been charged in error. That amount is not claimed here). Total fees for this period are therefore $20,430.00. Total expenses plus advances are $133.60.

(e) Exhibit "E" represents time and charges billed on June 15, 2001. HGM was charged out for 11.50 hours at $300 per hour, totaling $3,450.00. JHM was charged out for 8.50 hours at $50 per hour, totaling $425.00. MBD was charged out for 2 hours at $140 per hour, totaling $280.00. (No charge was made for 7 hours of JMH's time at $50 for a total of $350). Total fees for this period are therefore $4,155.00. Total expenses plus advances are $75.93.

(f) Exhibit "F" represents time billed on June 27, 2001. HGM was charged out for 2.75 hours at $300 per hour, totaling $825.00.

(g) Exhibit "G" represents charges billed on August 7, 2001 and lists total expenses plus advances of $759.93.

(h) Exhibit "H" represents time and charges billed on September 18, 2001. HGM was charged out for 48 hours at $300 per hour, totaling $14,400.00. MBD was charged out for 22.75 hours at $140 per hour, totaling $3,185. CPK was charged out for 0.50 hours at $250 per hour, totaling $125. Total fees for this period are therefore $17,710.00. Total expenses plus advances are $302.23.

(i) Exhibit "I" represents time and charges billed on December 21, 2001. HGM was charged out for 17.25 hours at $300 per hour, totaling $5,175.00. MBD was charged out for 2.75 hours at $140 per hour, totaling $385.00. CGD was charged out for 4.30 hours at $60 per hour, totaling $258.00. CO was charged out for 7 hours at $50 per hour, totaling $350.00. Total fees for this period are therefore $6,168.00. Total expenses plus advances are $84.04.

(j) Exhibit "J" represents time and charges billed on February 8, 2002. HGM was charged out for 18.50 hours at $300 per hour, totaling $5,550.00. Total fees for this period are therefore $5,550.00. Total expenses plus advances are $482.74.

18. The total of the foregoing is $120,564.25 with regard to fees and $3,602.57 with regard to expenses.

19. Exhibit "H" reflects the fact that, given the enormous continuing, unbudgeted cost of these proceedings to our client (an elderly, retired gentleman who has, to date, paid us over $450,000.00 in regard to this litigation) I granted the client a courtesy discount of

$9,996.11. This reduces the fees claimed above to $110.568.14. Expenses stay the same.

20. For the same reason, the firm recently agreed with the client to reduce my billing rate to $250 per hour to see him through to the conclusion of this matter. Exhibit "K" therefore represents currently unbilled time in which I am charged at $250 per hour for 2 hours, totaling $500.00 and CO is charged at $110 per hour for 0.5 hours, totaling $55.00. The total fees unbilled are, therefore, $555.00. This increases the fees claimed to $111,123.14. Expenses stay the same.

21. Exhibit "L" is a summary of these charges, in table format.

22. I estimate that preparation of the motion for appellate fees and supporting affidavits will take roughly 12 hours of my time and 6 hours of associate time. Most of that relates to "fees for fees," which is not usually awarded under Florida law. Nevertheless, roughly 2 hours of my time and 2 hours of my associate, Carlos Osorio's, time on this motion relates to the issue of entitlement of appellate fees under Fla. Stat § 769.79 and should be allowed. This would total $720.00. (I cannot presently anticipate whether the nature and extent of opposition to this application will necessitate the expenditure of substantial time on the issue of entitlement beyond my estimate). This would increase the fees claimed to $111,843.14. Expenses stay the same.

23. We suggest that $111,843.14 in regard to fees and $3,602.57 in regard to expenses are fair estimates for reasonable fees and expenses. There remains, however, the issue of "fees for fees."

24. Most of the appellate work - and the most important appellate work - related to the final defeat of the $90 million claim and the establishment of an entitlement to fees under Fla. Stat. § 768.79. Some portion of the appellate briefing, however, related to the amount of fees to be awarded if we were to prevail on both the foregoing points.

25. It is not clear whether Florida Courts would deem such "fee for fee" appellate work as not compensable. Still less is it clear that Florida courts would consider such work to be non-compensable when, as here, both the trial and appellate courts have remarked on the barrage of non-meritorious objections with which we were met on this issue - which we, nevertheless, had to brief and our client, nevertheless, had to pay for.

26. It is, in any event, not possible to segregate, with any certainty, what amount of the total time we had to spend addressing solely the amount of fees. If the Court is disposed to reduce the total award for time so spent, then, given the much greater importance of the time spent on the substantive issues as opposed to the time spent on debating an appropriate amount if we were to prevail on the substantive issues, we would suggest that no more than a 10% reduction of the overall bill would be appropriate. This would result in fees of $100,658.83 and expenses of $3,242.31 for a Grand Total of $103,901.14.

Hendrik G. Milne

Declared under penalty of perjury under the laws of the United States of America this 14th day of November, 2002.

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

June 16, 2000
File #: 5231-0041M
Statement No: 762

Toto adv. Mcmahan

Fees

			Hours
05/01/00	AVF	Research issue of court's discretion and ability to use judicial notice in determining the amount of a reasonable attorney's fee without resort to evidentiary hearing for reply to motion for reconsideration filed by Isaac & Evans.	1.25
	HGM	Prepare memorandum in opposition to Plaintiffs' motion to declare Defendant's award of fees moot; revisions to the same; assign additional research to A. Falzon; incorporate into memorandum; discuss with S. Garrigo; finalize memorandum.	6.00
	MBD	Review Motion and cited caselaw and make revisions; confer with H. Milne regarding revisions. (no charge)	0.50

05/02/00	HGM	Receipt and review lengthy correspondence from client regarding issues on appeal; telephone conference with client	0.50
05/04/00	HGM	Work on answer brief; first draft of statement of facts and first section of argument.	8.50
05/05/00	AVF	Review brief; research on miscellaneous points as assigned by H. Milne in drafting process.	5.00
	HGM	Continued work on appellate brief; telephone calls to confer with L. Russo and T. McConnell on legal; issues arising; office conference with client; assign research to A. Falzon and discuss progress on same.	10.50
05/06/00	HGM	Continued work on appellate brief.	9.00
05/07/00	AVF	Update research on elements of collateral estoppel in New York, finality of decision for collateral estoppel purposes in New York; research conflicts of law issue in application of New York law on collateral estoppel; research possibility of collecting attorney's fees on appeal pursuant to Fla. Stat. 768.79; draft Motion for entitlement to attorney's fees; research ability to assign claim in fraud, difference between	8.00
	HGM	Continued work on appellate brief.	12.00

05/08/00	AVF	Research and draft section memorandum dealing with assignment of claims and assignor's right to sue in fraud despite general assignment of claims.	4.00
	SMG	Review Answer Brief; provide comments to H. Milne. (no charge)	1.00
	MBD	Review Answer Brief and confer with H. Milne regarding revisions; review legal citations for correct form; confirm accuracy of citations and make revisions.	3.50
	HGM	Finalize appellate brief.	12.00
05/09/00	AVF	Research as to when order on motion for attorney's fees is a final judgment for appellate purposes.	2.00
05/12/00	HGM	Receipt and review of notice of submission of proposed order; copy client on all recent developments;	0.25
05/15/00	HGM	Receipt and review Order regarding timing of submissions or fees and costs; receipt and review Plaintiffs' Reply to Defendant's Memorandum in Opposition to Plaintiffs' Emergency Motion and note for follow-up.	0.25
	JB	Retrieve and shepardize cases in plaintiff's defendant's memorandum in opposition to plaintiff's emergency motion.	1.00

05/18/00	HGM	Review and note from research materials cited in Plaintiffs' Reply Memorandum on their Emergency Motion and commence draft for proposed supplemental memorandum.	4.00
05/22/00	HGM	Receipt and review of motion to submit Plaintiff's Supplemental response, further regarding motion to declare award of fees moot, etc.;	0.25
05/23/00	HGM	Receipt and review Appellants' Response to Appellees Motion for Fees and Costs and Memorandum of Law;	
05/24/00	HGM	Receipt, review and note from motion for permission to submit plaintiffs' supplemental response including memorandum of law in further support of plaintiffs' motion to declare defendant's award of fees moot, etc.; appellants' response to appellee's motion for fees and costs and memorandum of law (appellate court) ; receipt and review of order denying motion to declare fee award moot and denying motion for reconsideration and withholding ruling on motion to stay enforcement; receipt and review of order denying motion to submit supplemental response on fee motion;	1.00
05/26/00	HGM	Review files to select materials for review by R.	

		Hackleman for expert opinion on fees and costs; office conference *with R.* Hackleman regarding background fact's and materials for formulation of opinion on fees and **costs;** initial review and notes from	6.00	
05/30/00	HGM	Receipt and review of affidavit of R. Hackleman; commence preparation of notice of additional affidavits on motion for fees and costs.	1.00	
05/31/00	HGM	Finalize affidavit with additional invoice; finalize notice of filing; attach affidavit of R. Hackleman and file and serve; review appellate rules of timing of reply memorandum on motion; commence work on same.	1.00	
		For Current Services Rendered Thru 05/31/00	98.50	25,556.25

Expenses

05/01/00	Lexis Legal research #0004047352	185.34
05/31/00	Telephone Long Distance	16.81
	Total Expenses	202.15

Advances

03/30/00	DLS #165529/Retrieve documents outside NY Metro area	163.00
05/06/00	Courier Exec2000 #I09750	21.00
05/08/00	ShoreCrest Investigations - Inv. #10014	456.78
05/09/00	Legal Impressions Inv. #65586	110.70
05/31/00	PACER-electronic court access (May)	3.36
	Total Advances	754.84
	Total Current Work	26,513.24

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

August 15, 2000
File #: 5231-0041M
Statement No: 1236

Toto adv. McMahan

Fees

			Hours
06/01/00	HGM	Prepare fax to P. Evans; research cases cited in Appellants' Response Memorandum on Motion for Appellate Fees; draft motion for extension to submit Reply; prepare Reply Memorandum.	4.00
06/02/00	HGM	Review reply papers just filed; note typographical errors; prepare notice of correction; prepare notice of non-opposition.	0.25
06/14/00	HGM	Follow-up on opposition papers not yet received from opposing counsel and receipt	0.25
06/26/00	HGM	Receipt and initial review and notation from memorandum of law in opposition on issue of fees.	0.50
06/30/00	HGM	Review voluminous case-law on opposition to Verified	

07/01/00	HGM	Bill of Fees and Costs and commence draft reply.	7.75	
		Receipt and review fax from client and prepare lengthy response; continued work on reply memo on fee motion.	4.00	
07/02/00	HGM	Successive redrafts of reply memorandum to opposition to motion for fees and costs; select exhibits and finalize for filing	9.00	
07/12/00	HGM		4.50	
07/14/00	HGM		2.00	
07/24/00	HGM		8.50	
07/25/00	HGM		7.00	
07/26/00	HGM		3.00	
		For Current Services Rendered Thru 07/31/00	50.75	15,225.00

Expenses

06/30/00	Telephone Long Distance	37.85	
06/30/00	Lexis Legal research #0005049110	463.02	
	Total Expenses	500.85	

Advances

06/20/00	Courier Exec2000 #I11239 Delivery to US District Court	21.00
06/27/00	Courier FedEx #7-977-85927- Delivery to Isaacs & Evans LLP, NY	23.40
06/27/00	Courier FedEx #7-977-85927- Delivery to 11th Circuit Court of Appeals, Atlanta	15.34
06/27/00	Courier FedEx #7-977-85927- Delivery to Isaacs & Evans LLP, NY	16.38
06/27/00	Courier FedEx #7-977-85927- Delivery to 11th Circuit Court of Appeals, Atlanta	23.92
06/27/00	Courier Exec2000 #I10617	48.50
	Total Advances	148.54
	Total Current Work	15,874

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

December 14, 2000
File #: 5231-0041M
Statement No: 2168

Toto adv. McMahan

Fees

			Hours
08/03/00	HGM	Prepare motion for enlargement of time and proposed order.	0.25
08/07/00	HGM	Review and note from motion for stay of fee issue pending determination of the merits appeal; LEXIS research regarding 11th Circuit law on stays pending appeal; prepare memorandum in opposition.	4.00
08/11/00	HGM	prepare notice of filing additional fee and costs invoices in further support of fees and costs motion; review invoices for attachment and redact the same; receipt and review fax from client; prepare fax to client.	1.00
08/15/00	HGM	Receipt and review fax from client; calendar appellate preparation and pre-hearing conference dates; review	

		recent filings.	0.25
08/17/00	HGM	review file for further action; prepare e-mail to client.	0.25
08/28/00	HGM	Receipt, review and note from Objections to defendants Notice of Filing Further Invoices in Support of Motion for Fees and Costs; receipt and review Reply to Memorandum in Opposition on Motion for Stay; receipt and review Order Denying Motion for Stay; prepare fax to client.	0.25
08/29/00	HGM	Receipt and review order denying stay and prepare letter to client.	0.75
08/30/00	HGM	Receipt and review order awarding fees; review of pleadings to determine open issues for clarification; telephone conference with client's office.	1.25
09/05/00	HGM	Review file and prepare supplemental motion for fees and costs.	1.75
09/12/00	HGM	Research issue of amount of supersedeas bond.	0.50
09/15/00	HGM	Review cases regarding recovery of fees on appeal.	10.50
10/04/00	HGM	Review civil appeal statements from McMahan and Nemesis Veritas and review appellate rules for upcoming action to be taken and dates therefore; prepare civil appeal statement and associated	

		documents.	2.50
	HGM	Prepare civil appeal statement and associated documents.	2.00
10/10/00	HGM	Prepare reply memorandum on supplemental motion for fees and costs; receipt, review and calendar notice of oral argument;	1.00
10/11/00	HGM	Review mediation notice and 11th Circuit Guidelines for Mediation; conference with J. Hughson to direct further research in preparation for oral argument on merits appeal; prepare fax to L. Isaacs.	1.00
	FRM	Conference with HGM for direction on research in preparation for 11th Circuit oral argument and other as yet pending appeals.	0.75
10/16/00	HGM	Conference with J. Hughson to recap research results to prepare for oral argument on merits appeal. (no charge)	1.00
	FRM	Conference with HGM for review of research; discussion of merit issues for appeal. (no charge)	1.00
10/24/00	FRM	Development of research memorandum for appeal.	6.00
10/25/00	FRM	Reorganization and completion of research memorandum for appeal.	7.00

10/26/00	HGM	Discuss further research for fees appeal with J. Hughson.	0.50
	FRM	Retrieval of federal and state case law relevant to points raised in both the appellate brief and in the pleadings file; retrieval of state and federal statutes relevant to points raised in both the appellate brief and in the pleadings file.	6.50
10/27/00	FRM	Further retrieval of federal and state case law relevant to points raised in both the appellate brief and in the pleadings file; retrieval of state and federal statutes relevant to points raised in both the appellate brief and in the pleadings file; organization of issues raised in the legal research to form an outline for arguments against those raised in the appellate brief.	7.50
10/29/00	FRM	Organization of case law analysis and research of Appellants' materials into sub arguments in preparation for a preliminary draft of Appellee's brief; preliminary draft of Appellees brief and cross-appeal brief.	11.50
10/30/00	HGM	Receipt and review fax from client and prepare e-mail response; conference with J. Hughson regarding results	

		of research and assign further research on issue of liability for fees under various statutory grounds and amount of fees in appeal and cross-appeal.	1.25
	FRM	Conference with H. Milne to review preliminary response in attorneys' fees appeal; direction for further research and analysis; commence such further research.	10.00
10/31/00	FRM	Review of New York case law related to covenants not to sue and releases; review of case law and pleadings materials (re choice of law and the application of Fla. Stat. 768.79 to a diversity case subject to Virginia and New York law) ; review of federal case law applying 28 U.S.C.S. 1927 to vexatious and multiplicative bad faith litigation.	7.25
11/01/00	FRM	Retrieval of Restatement (2nd) Conflict of Laws and Restatement Digests listing law citing material re atty. fee statutes and conflict of law analysis; research case law treating atty. fee statutes in conflict of law analyses; research applicability of offer of judgment statute to underlying interference claim against Toto.	7.00
11/02/00	FRM	Research 11th Circuit and Florida State case law re	

		conflict of laws generally; research of Virginia statutory and case law re fee-shifting generally and, specifically, Virginia's public policy position re fee-shifting; preliminary draft of appellate brief; preliminary draft of cross-appeal brief.	9.50
11/20/00	HGM	Receipt and review order on motion for leave to withdraw as local counsel; commence review of appellate research materials; telephone conference with Clerk of 11th Circuit; prepare e-mail to client regarding re-scheduled oral argument.	2.25
11/22/00	HGM	Work on appellate brief; prepare fax to opposing counsel regarding missing record excerpts.	6.50
11/24/00	HGM	Continued work on response brief on appeal regarding fees and cross-appeal regarding denial of entry of sanctions; prepare fax to P. Evans.	12.75
	FRM	Assistance to H. Milne (drafting Atty's Fees Brief).	7.50
11/25/00	HGM	Continued work on response brief on appeal regarding fees and cross-appeal regarding denial of entry of sanctions.	14.50
	FRM	Assistance to H. Milne (drafting Atty's Fees Brief).	14.00
11/26/00	HGM	Continued work on response brief on appeal regarding	

		fees and cross-appeal regarding denial of entry of sanctions.	16.25	
	FRM	Assistance to H. Milne (drafting Atty's Fees Brief).	14.00	
11/27/00	MBD	Review Appellate Brief and case citations and make appropriate revisions; further review and revisions with Hendrik G. Milne; review appellate rules regarding case and statute citations in brief; review of and suggested edits to appellate brief.	5.50	
	HGM	Finalize response brief on appeal regarding fees and cross-appeal regarding denial of entry of sanctions and file and serve same.	12.75	
	FRM	Assistance to H. Milne (editing and completing Atty's Fees Brief).	7.00	
11/28/00	HGM	Review fax from P. Evans and prepare and send fax in reply; discuss further research with J. Hughson for reply.	0.25	
	FRM	Complete research binder for Appellee/Cross-Appellant brief.	2.00	
		For Current Services Rendered Thru 11/30/00	219.75	32,845.00

Expenses

	Telephone Long Distance	37.97
	Total Expenses Thru 11/30/00	37.97
	Finance charge credit	-110.10
	Total Credits for Expenses	-110.10

Advances

05/08/00	FedEx #7-976-50136 Delivery to U.S. Court of Appeal, Atlanta, GA	32.76
05/08/00	FedEx #7-976-50136 Delivery to Isaacs & Evans LLP, New York	23.40
05/10/00	FedEx #7-976-50136 Delivery to (US Court of Appeals, Atlanta, GA	15.34
08/05/00	Courier Exec2000 #12561	21.00
08/12/00	Courier Exec2000 #I12774	14.25
08/16/00	Courier Exec2000 #I12994	21.00
09/09/00	Courier Exec2000 #I13779	21.00
09/19/00	Filing Fees - Notice of Cross Appeal - Clerk, United States District Court	105.00

09/20/00	Courier Exec 2000 #I14232	23.75
09/21/00	Courier Exec 2000 #I14232	21.00
10/06/00	Courier Exec 2000 #I14232 – Delivery to USDC	21.00
10/13/00	Courier Exec 2000 #I15056	21.00
10/21/00	Courier Exec 2000 #I15056	21.00
10/24/00	FedEx #5-622-27639	21.32
11/30/00	Courier UPS #1158540103	29.40
11/30/00	Miscellaneous Costs Legal Impressions , Inv. # 68278	164.31
	Total Advances	576.53
	Total Current Charges	33,349.40

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

April 18, 2001
File #: 5231-0041M
Statement No: 2970

Toto adv. McMahan

Fees

			Hours
12/04/00	HGM	Complete oral argument certificate; follow-up on 11th Circuit request for briefs on disk;	0.25
12/22/00	HGM	Receipt, review and calendar notice of oral argument; prepare e-mail to client regarding the same.	0.25
01/09/01	HGM	Receipt, initial review and note from answer briefs of McMahan and Beiley; initial review of selected cases; prepare fax to client.	3.25
01/11/01	HGM	Review and note from research materials for reply brief.	5.50
01/12/01	HGM	Continued review and notation from research materials for reply brief; discuss same with J. Hughson; assign further research; review and note from pleadings files.	4.75
01/14/01	JMH	Prepare draft memorandum analyzing the latest	

		relevant caselaw related to the collateral estoppel and attorney's fees arguments on cross-appeal - in preparation for HGM's drafting of reply brief on the cross-appeal.	3.00
01/15/01	JMH	Preparation of memorandum supplement for atty's fees cross appeal reply brief (continued retrieval of relevant case law and subsequent analysis of same) .	6.50
	HGM	Prepare note outline for reply brief.	2.25
01/16/01	HGM	Continued review and notation from research materials and pleadings files for reply brief.	4.75
01/18/01	HGM	Finalize review of research materials; prepare first draft of reply brief on appeal.	6.50
01/19/01	HGM	Finalize, proof-read and execute reply brief on fee appeal; prepare motion for appellate fees.	7.75
	JMH	Assistance to H. Milne and M. Danger in final composition of the Cross-Appeal Reply Brief on the attorneys' fees issue.	9.00
	MBD	Research regarding standard for review of abuse of discretion and potential remedy by Court of Appeals; review and proof read of draft of brief and check and shepardize all citations.	7.00

01/28/01	JMH	Preparation of research files for 11th Cir. oral argument (material on both merits and attorneys' fees).	3.00
01/30/01	HGM	Review of case-law to prepare for oral argument; receipt of voice-mail from Clerk of 11th Circuit regarding oral argument.	1.25
01/31/01	HGM	File review and notes from materials for oral argument.	2.50
02/05/01	HGM	Receipt and review e-mail from client and prepare reply.	0.25
02/07/01	HGM	Review pleadings files and local rules for notice to clerk of undisposed of motions; receipt and review and respond to letter from client; review docket report; request copies of order and bond.	0.50
02/08/01	HGM	Review pleadings files; review supersedeas bond; prepare letter to counsel for McMahan et al regarding incorrect bond.	0.50
02/09/01	JMH	Confirmation of consolidation of appeals for Feb. 13 oral argument with Clerk of Court; update research for oral argument; retrieval of the latest New York caselaw on collateral estoppel; retrieval of the latest caselaw of Fla. Stat.57.105 and 768.79; retrieval of the latest caselaw on breaches of releases and connected tortious interference with a release agreement: commencement	

		of analysis of caselaw highlighting relevant passages for H. Milne's review (preparation for oral argument on Feb. 13, 2001).	11.00
	HGM	Review and note from briefs and assign update research on appellate issues to J. Hughson to prepare for oral argument.	2.00
02/11/01	JMH	Read final set of case law for H. Milne's oral argument on the merits and attorney's fees appeals; selection of most relevant cases preparation of four memoranda detailing (skeletally) the lines of argument found in the case law selected. (No Charge)	9.00
02/12/01	HGM	Conference with client and prepare for oral argument.	7.75
02/13/01	JMH	Preparation of memo of case law applying conflicts of law analyses to the application	5.50
	HGM	Final preparation for oral argument; attendance at oral argument; post-argument conference with client; assign further research to J. Hughson for notice of supplemental authority.	7.00
02/14/01	HGM	Review of additional caselaw from J. Hughson.	1.00
02/15/01	JMH	Continued research for additional authority.	3.00
02/16/01	JMH	Preparation of draft letter of supplemental authority,	

		pursuant to Toto's consolidated appeals, to be sent to the 11th Circuit clerk (to clarify points addressed in oral argument of 2/13/2001). With relevant cases attached for use by HGM. (No Charge)	9.00	
02/17/01	JMH	Drafting and completion of tentative letter of supplemental authority to the Circuit Clerk; final gathering and highlighting of copies of authorities cited. (No Charge)	9.00	
		For Current Services Rendered Thru 02/28/01	133.00	20,880.00

133a

Expenses

12/30/00	Lexis Legal research	78.05
01/31/01	Telephone Long Distance	1.37
01/31/01	Telephone Long Distance	11.86
	Total Expenses	91.28

Advances

10/14/01	Courier Exec2000 , Inv. #I15056, delivered to USDC, Miami	21.00

11/01/00	Courier Federal Express #5-622-27639/Delivery to US Court of Appeals, Atlanta on Oct.6.	21.32
	Total Advances	42.32

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

June 15, 2001
File #: 5231-0041M
Statement No: 3452

Toto adv. McMahan

Fees

			Hours
03/28/01	HGM	Review of case-law assembled by J. Hughson for submission of additional authority to court on issues **on** appeal; make selection from same; further update research from such cases.	
03/30/01	HGM	Additional research regarding conflicts of laws issues on appeal for notice of supplemental authority to Court.	2.50
	JMH	Retrieval of Attorneys' Fees Briefs for specific cites to Restatement (Second) Conflict of Laws sec. 122.	3.50
04/01/01	JMH	Research into Florida case law that would guide a determination as to whether Fla. Stat. sec. 768.79 would apply in an action subject to non Florida law. Retrieval of caselaw relevant to a determination of how	8.50

		a Florida court would determine the applicability of Fla. Stat. Sec. 768.79 in a case subject to non Florida law. Drafting and final editing of a memorandum for H. Milne compiling the results of this research along with that of 03/30/2001. (No Charge)	7.00
04/02/01	HGM	Review research memoranda prepared by J. Hughson and read and note from cases copied for potential inclusion in notice of supplemental authorities; assign further research relative to notice of supplemental authority and discuss research conclusions with J. Hughson.	1.25
04/05/01	HGM	Final research for notice of supplemental authority; review briefs to ensure no duplication; complete and file notice of supplemental authority.	3.50
	MBD	Review notice of supplemental authority; Confirm accuracy of legal citations and shepardize; Make certain modifications and confer regarding the same with Hendrik G. Milne.	2.00
04/19/01	HGM	Receipt and review of notice of response to statement of supplemental authority; LEXIS research regarding authority quoted.	0.75

	For Current Services Rendered Thru 04/30/01	29.00	4,155.00
	Expenses		
03/13/01	Photocopy File #Toto/Inv. MIA186160		64.00
	Total Expenses		64.00
	Advances		
04/16/01	Lexis-Nexis/Ref.Inv. 0103026679		11.93
	Total Advances		11.93
	Total Current Work		4,230.93

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

June 27, 2001
File #: 5231-0041M
Statement No: 3504

Toto adv. McMahan

Fees

			Hours
05/02/01	HGM	Prepare motion and memorandum of law to correct supersedeas bond; check local *rules;* review pleadings and correspondence files to select exhibits to motion; *LEXIS* research for *citations* supporting continuing jurisdiction of District Court with regard to modification of supersedeas bonds; include supporting citations in memorandum of law; finalize and execute.	1.75
05/21/01	HGM	Receipt and review plaintiffs' memorandum in response to defendant's motion for corrected bond.	0.23
05/24/01	HGM	Receipt and review order of court regarding correction of bond and instruct assistant to search docket for (1) "memorandum of the parties," referred to therein and	0.25

		(2) corrected bond rider.		
05/25/01	HGM	Receipt and review of Plaintiffs' Supplemental Memorandum in Response to Defendant's Motion for a Corrected Bond; receipt and review Notice of Filing Rider to Supersedeas Bond; compare same to existing Supersedeas Bond.	0.25	
05/29/01		LEXIS check for ruling by 11th Circuit	0.25	
		For Current Services Rendered Thru 05/31/01	2.75	825.00
		Current Work		825.00

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

August 07, 2001
File #: 5231-0041M
Statement No: 3632

Toto adv. McMahan

Expenses

06/26/01	Telephone Long Distance /June-01	11.36
	Total Expenses	11.36

Advances

06/18/01	Lexis Nexis/Ref.Acct#104RDB/Inv#0105043159/Billing Period 05/01/01 to 05/31/01.	720.75
06/29/01	Courier /Federal Express/Acct#1669-2431-6	27.32
	Total Advances	748.57
	Total Current Charges	759.93

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

September 18, 2001
File #: 5231-0041M
Statement No: 3776

Toto adv. McMahan

Fees

			Hours
07/12/01	HGM	Receipt and review of 11th Circuit decision on merits and fees appeals; brief review of appellate rules regarding re-hearing and en banc review; prepare e-mail report to client.	1.00
07/16/01	HGM	Further review of 11th Circuit rules regarding rehearing and en banc review and prepare e-mail to client regarding courses of action.	0.50
07/18/01	MBD	Confer with Hendrik G. Milne regarding 11th Cir opinion; Attempts to contact W. Toto and prepare email to the same regarding instructions for proceeding.	0.25
07/19/01	MBD	Receive and review email from W. Toto; Review 11th Circuit Court opinion; Confer with Hendrik G. Milne	

		regarding motion for rehearing; Telephone conference with Mr. Toto regarding options for proceeding.	1.50
	HGM	Telephone conference with client regarding merits of moving for rehearing of 11th Circuit decision.	1.00
07/21/01	HGM	Brief research regarding en banc review and rehearing and prepare report to client via e-mail.	1.00
07/22/01	MBD	Research appellate rules of procedure and 11th circuit local rules regarding time for filing petition for rehearing and research caselaw of the same; Confer with Hendrik G. Milne regarding conclusions of research	1.50
07/23/01	MBD	Review email of Hendrik G. Milne to *W.* Toto regarding motion for rehearing; Confer with Hendrik G. Milne regarding the same and research of issues	0.25
07/24/01	HGM	Receipt and review of fax from P. Evans regarding costs; review appellate rules and prepare fax response.	0.50
07/25/01	HGM	Retrieve case-law cited in 11th Circuit opinion and review and highlight same; research to M. Danger regarding certification to Florida Supreme Court and standard for en banc review.	4.00
	MBD	Confer with H. Milne and commence research	

		regarding certification by federal courts of appeal to state supreme courts to unsettled issues of state law	2.00
07/26/01	HGM	Discuss research results regarding certification with M. Danger; review case-law retrieved; prepare outline draft brief; additional research.	6.75
	MBD	Confer with Hendrik G. Milne regarding petition for rehearing en banc; Research 11th circuit court rules and opinions regarding en banc review; Discuss results with Hendrik G. Milne and continue research regarding circumstances under which certification to state supreme court would be required	3.75
07/27/01	MBD	Continue research regarding certification to state supreme court; Prepare note to H. Milne regarding factors 11th Circuit Ct of appeals considers for certification in absence of controlling state law.	3.50
07/28/01	HGM	Conclude review of research materials; prepare draft of first section and part of second section of petition for en banc review.	8.00
07/29/01	HGM	Conclude first draft of all sections of petition for en banc review; several telephone discussions with M. Danger regarding additional research.	9.00

	MBD	Research regarding appellate rules on petitions for rehearing and en banc review; Confer with Hendrik G. Milne regarding same	2.50
07/30/01	CPK	Proofread motion for en banc review. Comments to HGM.	0.50
	HGM	Conclude draft petition for rehearing banc; e-mail and fax draft to client; revision of same to fit page-limits; draft remaining required sections of brief (certificate of interested persons; statement of counsel regarding en banc review; statement of issue asserted to require en banc consideration; statement of the course of proceedings and disposition of the case; statement of facts necessary to argument of the issues; conclusion); finalize petition for en banc rehearing and federal express for filing and serve copies on all parties by mail.	10.50
	MBD	Review petition; Prepare Certificate of Interested Persons; Confer with Hendrik G. Milne regarding rules for content of petition and service of the same; Verify accuracy and correct form of citations; Make corrections to Petition.	7.50
08/02/01	HGM	Review of 11th Circuit rules and internal operating	

		procedures and prepare e-mail to client regarding the same and prospective possible actions by appellate court.	0.50	
08/06/01	HGM	Review costs motion in District Court and research and prepare response.	2.00	
08/07/01	HGM	Review bill of costs in 11th Circuit and prepare objection; report to client via e-mail.	1.00	
08/16/01	HGM	Receipt and review of Order on Costs from 11th Circuit and prepare Notice of Order for	0.50	
08/17/01	HGM	Receipt and review fax from L. Isaacs and prepare response.	0.25	
08/27/01	HGM	Receipt and review 11th Circuit memorandum regarding filing of motion for reconsideration of denial of costs; plaintiffs' reply to Toto's opposition to plaintiffs ' motion for costs; motion for reconsideration to 11th Circuit; plaintiffs' supplemental reply to notice of 11th Circuit order.	0.25	
08/29/01	HGM	Prepare response to motion for reconsideration to 11th Circuit and receipt of fax from client and prepare e-mail response to same.	1.25	
		Courtesy Discount		-9,996.11

	For Current Services Rendered Thru	71.25	7,713.89
	Expenses		
07/27/01	Telephone Long Distance /Billing Period 06/24/01 to 07/23/01.		19.99
08/16/01	Lexis Legal research /Ref.Inv#0107032413		207.19
08/28/01	Cable & Wireless/Billing Period 07/24/01 to 08/23/01.		5.43
	Total Expenses		232.61
	Advances		
08/23/01	Courier Exec2000 /Ref.Inv#I27059		30.75
08/30/01	Courier Exec2000 /Ref.Inv#I26795		22.75
09/05/01	Courier Federal Express /Ref.Inv#5-919-18749		16.12
	Total Advances		69.62
	Total Current Charges		8,016.12

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

December 21, 2001
File #: 5231-0041M
Statement No: 4528

Toto adv. McMahan

Fees

			Hours
10/04/01	MBD	Confirm status of Motion for Rehearing on Lexis.	0.25
10/22/01	HGM	Receipt and review order of court regarding costs in the District Court and fax to client; receipt and review of e-mail and prepare follow up response to client.	0.25
11/15/01	CGD	Research regarding available avenues to appeal or seek writ of certiorari to the U.S. Supreme Court based on the fact that a recent Florida case has decided the exact issue that the Eleventh Circuit refused to certify to the Florida Supreme Court.	4.30
11/19/01	CO	Research re grant of rehearing on basis of drastic change of state law draft memorandum with results.	7.00
	HGM	Review and highlight research materials compiled by	

		law clerks; further research regarding possible second motion for rehearing and possible alternative approaches to further appellate review of 11th Circuit decision on Fla. Stat. 768.79 in light of recent Florida appellate decision in BDO Seidman v. British Car auctions, including associated issues (necessity of motion or petition, meaning of "sub judice" among the case-law of the Circuits; type of change in the law and other requirements for further review).	5.75
11/20/01	HGM	Review research materials; further research and draft renewed motion for rehearing; report to client.	6.00
	MBD	Research regarding authority of state Court of Appeals decision in absence of decision by Supreme Court; Review motion and confer with Hendrik G. Milne regarding the same.	2.50
11/23/01	HGM	Review file and appellate rules and report to client.	1.50
11/27/01	HGM	Lexis search to determine further citations to McMahan v. Toto and BDO Seidman v. British Car Auctions; telephone conference with Lenore Smith at Holland & Knight (counsel for BDO Seidman) to check on status of any rehearing and discuss exchange of briefs; report	

		status to client; receipt and review of motion for certification to Florida Supreme Court filed in BDO Seidman action (from L. Smith); prepare fax to client; check status with clerk of 11th Circuit; prepare memorandum in opposition to motion to discharge supersedeas; prepare e-mail to Cleveland co-counsel.	2.25	
11/28/01	HGM	Prepare analysis and projected next actions for client.	1.00	
11/30/01	HGM	Prepare lengthy e-mail to client; check LEXIS for recent cases citing to McMahan v. Toto and BDO Seidman V. British Car Auctions.	0.50	
		For Current Services Rendered Thru 11/30/01	31.30	6,168.00

Expenses

Telephone Long Distance 9.12	9.12
Lexis Legal research	55.99
Total Expenses Thru 11/30/01	65.11

Advances

10/26/01	Cable & Wireless/Billing Period 09/24/01 to 10/23/01.	2.55
10/26/01	Courier Federal Express /Ref.Inv#5-969-65895	16.38
	Total Advances	18.93
	Total Current Charges	6,252.04

William A. Toto
Three Brecksville Commons
8221 Brecksville Rd., Suite 203
Brecksville, OH 44141

February 08, 2002
File #: 5231-0041M
Statement No: 4683

Toto adv. McMahan

Fees

			Hours
12/03/01	HGM	Check LEXIS for further decided cases referring to McMahan and BDO Seidman decisions.	0.50
12/07/01	HGM	Receipt and review of exchange of e-mail regarding pending matters; analysis of possible permutations of appellate results and relay to client in lengthy e-mail for guidance.	1.50
12/28/01	HGM	Research several issues regarding supplemental memorandum on second rehearing and commence draft memorandum.	5.00
12/30/01	HGM	Continued research regarding issues raised in supplemental memorandum on second rehearing and further work on draft supplemental memorandum.	4.00

12/31/01	HGM	Conclude research regarding issues raised in supplemental memorandum on second rehearing and finalize draft supplemental memorandum; prepare motion for leave to file same; prepare fax to P. Evans serving same; prepare notice in District Court regarding facts pertinent to supersedeas bond issue.	4.50	
01/04/02	HGM	Research status of BDO Seidman and learn of final order; telephone conference with L. Smith, counsel for BDO Seidman and arrange for transmission of order and motion; prepare lengthy status analysis for client; prepare notice to 11th Circuit regarding finality of BDO Seidman decision.	2.00	
01/14/02	HGM	Lengthy telephone conference with client regarding status, probable future developments and further action to be taken.	1.00	
		For Current Services Rendered Thru 01/31/02	18.50	5,550.00

Expenses

Telephone Long Distance	7.44
Total Expenses Thru 01/31/02	7.44

Advances

12/06/01	Courier Federal Express/Ref. Inv#4-015-29025	17.00
12/06/01	Courier Federal Express/Ref.Inv#4-015-29025	27.30
12/13/01	Lexis Nexis/Ref.Inv#0111031465/Billing Period 11/01/01 to 11/30/01.	61.94
12/13/01	Lexis Nexis/Ref.Inv#0111031465/Billing Period 11/01/01 to 11/30/01.	94.92
12/13/01	Lexis Nexis/Ref.Inv#0111031465/Billing Period 11/01/01 to 11/30/01.	6.50
12/13/01	Lexis Nexis/Ref.Inv#0111031465/Billing Period 11/01/01 to 11/30/01. Lexis Nexis/Ref.Inv#0111031465/Billing Period 11/01/01 to 11/30/01.	12.87
12/13/01	Lexis Nexis/Ref.Inv#0111031465/Billing Period 11/01/01 to 11/30/01.	189.99
12/13/01	Lexis Nexis/Ref.Inv#0111031465/Billing Period 11/01/01 to 11/30/01.	64.78
	Total Advances	475.30
	Total Current Charges	6,032.74

Date 11/12/02

TABS III Detail Work-In-Process Report
Aballi, Milne, Kalil & Escagedo, P.A.

Primary Timekeeper: 2 Hendrik G. Milne

Client: 5231.0041M Toto/William A.
TOTO/WILLIAM A. Toto adv. McMahan

Primary Timekeeper: 2 HGM Category: 13 Litigiation
Secondary Timekeeper: 2 HGM Rate Code: 3 Draft: Standard Final: Standard
Originating Timekeeper: 2 HGM Date Opened: 07/11/97

Date	Tmkr	Cat	Tcode	Ref#	Rate	Hrs	Amt	Description
10/02/02	2 HGM	13	1	593	250.00	1.00	250.00	Receipt of e-mail from client; and review of decision in BDO Seidman in Florida Supreme Court; discuss same with L. Smith; prepare

								e-mail to client regarding the same; prepare notice of Supreme Court's decision to U.S. 11th Circuit.
10/07/02	2 HGM	13	1	594	250.00	1.00	250.00	Prepare memo to client regarding impact of Florida Supreme Court decision and possible ramifications.
11/01/02	7 CO	13	1	595	110.00	0.50	55.00	Conference with Hendrik G. Milne regarding research assignments and delegation of response to opposing counsel's latest filing in the 11th Circuit.

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit A

Invoice Date	Attorney	Rate	Hours	Amount
6/16/00				
Fees	HGM	$300	72.25	$21,675.00
	AVF	$165	20.25	$3,341.25
	MBD	$140	3.50	$490.00
		Total Fees		$25,506.25
	Costs		Amount	
	Lexis Legal Research		$185.00	$185.00
	Long Distance		$16.81	$16.81
	DLS-DOC Retrieval		$163.00	$163.00
	Courier		$21.00	$21.00
	Legal Impressions		$110.00	$110.00

	PACER-Court Access		$3.36	$3.36
		Total Costs		$500.21
		Total		$26,006.46

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit B

Invoice Date	Attorney	Rate	Hours	Amount
8/15/00				
Fees	HGM	$300	25.75	$7,725.00
		Total Fees		$7,725.00
			Amount	
	Costs			
			$463.02	$463.02
	Lexis Legal Research		$37.83	$37.83
	Long Distance		$21.00	$21.00
	Courier		$23.40	$23.40
	Courier		$15.34	$15.34
	Courier		$16.38	$16.38
	Courier		$23.92	$23.92

	Courier		$48.50	$48.50
		Total Costs		$649.39
		Total		$8,374.39

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit C

Invoice Date	Attorney	Rate	Hours	Amount
12/14/00				
Fees	HGM	$300	84.25	$25,275.00
	MBD	$140	5.50	$770.00
	JMH	$50	128.00	$6,400.00
		Total Fees		$32,445.00
	Costs		Amount	
	Long Distance		$37.97	$37.97
	FEDEX		$32.76	$32.76
	FEDEX		$23.40	$23.40
	FEDEX		$15.34	$15.34
	Courier		$21.00	$21.00

	Courier		$14.25	$14.25
	Courier		$21.00	$21.00
	Courier		$21.00	$21.00
	Filing Fee		$105.00	$105.00
	Courier		$23.75	$23.75
	Courier		$21.00	$21.00
	Courier		$21.00	$21.00
	Courier		$21.00	$21.00
	Courier		$21.00	$21.00
	FEDEX		$21.32	$21.32
	Courier		$29.40	$29.40
	Legal Impressions		$164.31	$164.31
		Total Costs		$614.50
		Total		$33,059.50

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit D

Invoice Date	Attorney	Rate	Hours	Amount
4/18/01				
Fees	HGM	$300	58.00	$17,400.00
	MBD	$140	7.00	$980.00
	JMH	$50	41.00	$2,050.00
		Total Fees		$20,430.00
	Costs		Amount	
	Lexis Legal Research		$78.05	$78.05
	Long Distance		$1.37	$1.37
	Long Distance		$11.86	$11.86
	Courier		$21.00	$21.00
	Courier		$21.32	$21.32

		Total Costs		$133.60
		Total		$20,563.60

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit E

Invoice Date	Attorney	Rate	Hours	Amount
6/15/01				
Fees	HGM	$300	11.50	$3,450.00
	MBD	$140	2.00	$280.00
	JMH	$50	8.50	$425.00
		Total Fees		$4,155.00
	Costs		Amount	
	Photocopy File		$64.00	$64.00
	Lexis Legal Research		$11.93	$11.93
		Total Costs		$75.93

		Total		$4,230.93

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit F

Invoice Date	Attorney	Rate	Hours	Amount
6/27/01				
Fees	HGM	$300	2.75	$825.00
		Total Fees		$825.00
	Costs		Amount	
				$0.00
		Total Costs		$0.00
		Total		$825.00

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit G

Invoice Date	Attorney	Rate	Hours	Amount
8/7/01				
Fees				$0.00
		Total Fees		$0.00
	Costs		Amount	
	Long Distance		$11.36	$11.36
	Lexis Legal Research		$720.75	$720.75
	Courier		$27.82	$27.82
		Total Costs		$759.93
		Total		$759.93

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit H

Invoice Date	Attorney	Rate	Hours	Amount
9/18/01				
Fees	HGM	$300	48.00	$14,400.00
	CPK	$250	0.50	$125.00
	MBD	$140	22.75	$3,185.00
		Total Fees		$17,710.00
	Costs		Amount	
	Long Distance		$19.99	$19.99
	Lexis Legal Research		$207.19	$207.19
	Courier		$30.75	$30.75
	Courier		$22.75	$22.75
	Courier		$16.12	$16.12

		Total Costs		$296.80
		Total		$18,006.80

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit I

Invoice Date	Attorney	Rate	Hours	Amount
12/21/01				
Fees	HGM	$300	17.25	$5,175.00
	MBD	$140	2.75	$385.00
	CGD	$60	4.30	$258.00
	CO	$50	7.00	$350.00
		Total Fees		$6,168.00
	Costs		Amount	
	Long Distance		$9.12	$9.12
	Lexis Legal Research		$55.99	$55.99
	Long Distance		$2.55	$2.55
	FEDEX		$16.38	$16.38

		Total Costs		$84.04
		Total		$6,252.04

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit J

Invoice Date	Attorney	Rate	Hours	Amount
2/18/02				
Fees	HGM	$300	18.5	$5,550.00
		Total Fees		$5,550.00
	Costs		Amount	
	Long Distance		$7.44	$7.44
	Courier		$17.00	$17.00
	Courier		$27.30	$27.30
	Lexis Legal Research		$61.94	$61.94
	Lexis Legal Research		$94.92	$94.92
	Lexis Legal Research		$6.50	$6.50
	Lexis Legal Research		$12.87	$12.87

	Lexis Legal Research		$189.99	$189.99
	Lexis Legal Research		$64.78	$64.78
		Total Costs		$482.74
		Total		$6,032.74

NEMESIS VERITAS V. WILLIAM TOTO
CASE NO. 00-10323/14278/14990
APPELLATE FEES

Exhibit K

Invoice Date	Attorney	Rate	Hours	Amount
Unbilled				
Fees	HGM	$250	2.00	$500.00
		$110	0.50	$55.00
		Total Fees		$555.00
	Costs		Amount	
				$0.00
		Total Costs		$0.00
		Total		$555.00

Case No.: 00-1 0323
Case No.: 00-14728
Case No.: 00-14990

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

USDC Case No. 96-8294

NEMESIS VERITAS, L.P., f/k/a
MCMAHAN & COMPANY and D. BRUCE MCMAHAN,
Appellants,

v.

WILLIAM A. TOTO,
Appellee.

AFFIDAVIT OF KEVIN J. MURRAY

I, Kevin J. Murray, do declare under penalty of perjury as follows:

1. I am a member in good standing of the Florida Bar and have been
admitted to practice law in the State of Florida since 1979.

2. I am a member of the trial bar of the United States District Court for the Southern District of Florida and I am also admitted to practice before the United States District Court for the Middle and Northern Districts of Florida, the Eleventh Circuit Court of the Appeals and the Court of Appeals for the Federal Circuit.

3. I am "AV" rated by Martindale-Hubbell and am a shareholder in the law firm of Kenny, Nachwalter, Seymour, Arnold, Critchlow & Spector, P.A., which is listed in Martindale-Hubbell's Bar Register.

4. Throughout the course of my legal career, I have specialized in the handling of complex commercial litigation and have tried cases in both state and federal courts in Florida. I have previously provided expert witness affidavits regarding issues of both entitlement to and the reasonable amount of attorneys' fees in the state and federal courts in Florida.

5. Any statements of fact made herein are stated upon personal knowledge. To the extent that I express any opinion herein, it is based upon reasonable probability within my knowledge and experience as an attorney specializing in commercial litigation and is submitted as being admissible within the scope of Fed. R. Evid. 702.

6. I have been asked by Mr. Milne, lead counsel in this matter to render an opinion on a reasonable fee to be awarded to his client, Mr. Toto, for the expense of this action while on appeal.

7. In rendering my opinion in this matter I have personally reviewed the pleadings filed in the appeal of this case, the working files and the billing records for the representation of Mr. William Toto through these appellate proceedings. I have interviewed Mr. Toto's counsel at length to discuss and explore the issues involved in this litigation and the history of this case and I have reviewed the Verified Bill of Fees and Costs to be submitted herein.

8. In considering a reasonable fee to be awarded, I have considered the law and factors set forth in the relevant portions of Farley v. Nationwide Mutual Insurance, 197 F.3d 1322, 1340-41 (11th Cir. 1999) and Bell v. U.S.B. Acquisition Co., 734 So.2d 403, 407 n.5 (Fla. 1999) and the criteria set forth in the Rules Regulating the Florida Bar, including Rule 4-1.5(b) Specifically, I considered the following criteria:

(a) The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(b) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.

(c) The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature.

(d) The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained.

(e) The time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client.

(f) The nature and length of the professional relationship with the client.

(g) The experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services.

(h) Whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

8. I believe that factors (a), (c), (d), (f) and (g) are significant here. As to (a), this was a case that involved time-consuming, intricate issues of first impression, requiring a high degree of skill. As to (b), the fees charged by Aballi Milne, $300 for a senior litigator and the range of lower rates for associates and law clerks was entirely reasonable for the time periods in question and below the top rates charged in Miami for such services. As to (d), stated at its most simple, these attorneys saved their client from a possible $90 million verdict and recovered very substantial fees for him under a cutting-edge legal theory of first impression in the State of Florida, on which there is very little case-law, nationwide. Despite initial lack of success on that fee theory and lack of success on re-hearing, Appellee's counsel remained alert to Florida legal developments in the pertinent area under review. When a Florida case was announced which supported his fee argument, despite the exhaustion of the ordinary appellate processes, Appellee's counsel successfully persuaded the Court - under a little-known U.S. Supreme Court doctrine - of its duty to review and reverse its prior decision and re-instate his client's fee award. As to (f), Appellee's counsel has presented Mr. Toto for five years

and has developed a close relationship with him that has expanded to his representation in other matters. As to (g), I have worked closely with Appellee's lead counsel, Mr. Milne, in a number of large cases over the last decade and can state from personal knowledge that he has a fine reputation, is an excellent academic lawyer, highly practical and experienced and a superb advocate, both in writing and on his feet in Court.

9. Given the reasonable hourly rates, the substantial billing discretion exercised, the client courtesy discount of close to $10,000 that was given Mr. Toto in September 2001, the reduced billing rate recently accorded him for the conclusion of these proceedings and the factors stated above, I believe that the amounts claimed in the Verified Bill of Fees and Costs, particularly as reduced by 10% to allow for the "fees for fees" issue, namely $100,658.83 for fees, $3,242.31 for expenses, for a Grand Total of $103,901.14 is a reasonable and necessary sum to compensate Mr. Toto for the further expense of this action.

Kevin J. Murray

Declared under penalty of perjury under the laws of the United States of America this 14th day of November, 2002.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellee, William A. Toto, certify that the following persons and entities have or may have an interest in the outcome of this case:

1. Aballi Milne Kalil & Escagedo, P.A. (Counsel for Appellee)

2. Richard A. Beiley (Counsel for Appellant)

3. Patti E. Evans (Counsel for Appellant)

4. lsaacs & Evans LLP (Counsel for Appellant)

5. Leigh R. lsaacs (Counsel for Appellant)

6. D. Bruce McMahan (Appellant)

7. Honorable Donald M. Middlebrooks (US District Court Judge)

8. Hendrik G. Milne (Counsel for Appellee)

9. Carlos F. Osorio (Counsel for Appellee)

10. Nemesis Veritas, L.P. (Appellant)

11. William A. Toto (Appellee)

IN THE DISTRICT COURT OF APPEALS
OF THE STATE OF FLORIDA
FOURTH DISTRICT
P.O. BOX 3315
WEST PALM BEACH, FL 33402

CASE NO.: 4D00-4297
L.T. NO.: 94-11198 12

B D O SEIDMAN, LLP,
Appellant/Petitioner(s),

v.

BRITISH CAR AUCTIONS, INC.
ETC., ET AL.,
Appellee/Respondent(s).

Filed October 31, 2001

BY ORDER OF THE COURT;

ORDERED that the motion for attorneys' fees filed by Daniel S. Pearson, counsel for appellant, BDO Seidman, is hereby granted, and pursuant to Fla. R. App. P. 9.400(b), upon remand of this cause the amount thereof shall be assessed by the trial court upon due notice and hearing, subject to review by this court under Fla. R. App. P. 9,400(c). If a motion for rehearing is filed in this court, then services rendered in connection therewith, including but not limited to preparation of a responsive pleading, shall be taken into account in computing the amount of the fee.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Howard Forman, Clerk
Daniel S. Pearson
Timothy J. McDermott
Paul R. Regensdort

MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

SUPREME COURT OF FLORIDA

CASE NO.: SC02-96
LOWER TRIIBUNAL NO.: 4D00-4297

B D O SEIDMAN, LLP,
Petitioner(s),

v.

BRITISH CAR AUCTIONS, INC.
ETC., ET AL.,
Respondent(s).

Filed Tuesday, September 24, 2002

This cause having heretofore been submitted to the Court on Jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court See Fla. R. App. R 9.330(d).

The Motion for Attorney's Fees is granted and it is ordered that Respondent shall recover from Petitioners the amount of $2,500.00 for the services of Respondent's attorney in. this Court

ANSTEAD, CJ., and PARIENTE, LEWIS, and QUINCE, JJ., and HARDING, Senior Justice, concur.

A True Copy
Test:

Thomas D. Hall Clerk, Supreme Court

Served:

J. RILEY WILLIAMS
D. R. REPASS
TIMOTHY J. MCDERMOTT
PAUL R. REGENSDORF
LENORE C. SMITH
DANIEL S. PIERSON
HON. MARILYN BEUTTENMULLER, CLERK
HON. HOWARD FORMAN, CLERK
HON CHARLES M. GREENE, JUDGE

EXHIBIT A

Supreme Court, U.S.
FILED
SEP 16 2003
OFFICE OF THE CLERK

No. 03-173

IN THE

United States Supreme Court

IN RE: WILLIAM A. TOTO

On Petition For A Writ of Mandamus
To The United States Court of Appeals for the Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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Counsel of Record
ISAACS & EVANS, LLP
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Attorneys for Respondents
Nemesis Veritas, L.P. f/k/a
McMahan & Company and
D. Bruce McMahan

QUESTION PRESENTED FOR REVIEW

Did the Eleventh Circuit's denial of petitioner's motion for appellate attorney's fees and expenses constitute a proper exercise of judicial power and discretion?

PARTIES TO THE PROCEEDING

The following parties were the Plaintiffs-Appellants-Cross-Appellees below and are the Respondents before this Court: D. Bruce McMahan Nemesis Veritas, f.k.a. McMahan & Company.

The following party was the Defendant-Appellee-Cross-Appellant below and is the Petitioner before this Court: William A. Toto

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STATEMENT OF THE CASE

This was an action for tortious interference with contractual relations. Petitioner Toto caused former limited partners of respondent Nemesis Veritas L.P. to sue it and respondent D. Bruce McMahan under, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act in violation of assignments and releases contained in Contracts of Sale and Security Agreements (the "Contracts") whereby said limited partners sold their interests to respondents. The action sought $30 million in damages.[1]

The consolidated appeals and cross-appeals in this case concerned various orders of the United States District Court for the Southern District of Florida. They were decided by the Eleventh Circuit Court of Appeals July 10, 2001 opinion, *McMahan v. Toto*, 256 F.3d 1120 (11th Cir. 2001), *amended* 311 F.3d 1077 (11th Cir. 2002) (the "July Opinion"). The July Opinion: (1) affirmed the District Court's grant of summary judgment dismissing the complaint and therefore denied a portion of Appellants' appeal; (2) reversed the District Court's grant of attorney's fees pursuant to Fla. Stat. §768.79 and therefore granted that part of Appellants' appeal; and (3) affirmed the trial court's denial of sanctions against appellants and their counsel.

Petitioner does not mention that in orders entered July 13, 2001 (App., infra. 21a) and December 11, 2001 (App., infra, 23a), petitioner was denied his motions for appellate attorney's fees. All fee claims other than those contained in the bills dated December 21, 2001 and February 8, 2002 were

---

[1] In support of his claim for inflated counsel fees, Petitioner repeatedly mischaracterized the claim as one of $90 million.

thereby decided adversely to petitioner. Petitioner never applied to recover costs. Further, petitioner never petitioned this Court in connection with the orders entered December 11, 2001 or July 13, 2002 denying him appellate attorney's fees.

Prior to the issuance of the mandate, and on September 30, 2001, *BDO Seidman v. British Car Auction, Inc.*, 802 So.2d 366 (Fla 4th DCA 2001) was decided. *BDO Seidman* contradicted the Eleventh Circuit's holding in the instant case that Fla. Stat. §768.79 did not apply in a diversity case litigated in Florida where the substantive issues were governed by the law of another state. *Seidman* specifically refused to apply a conflict of laws analysis as required under Federal law. *Seidman* cited to the court's decision and was undoubtedly "picked up" by shepardizing this case.

Petitioner thereupon renewed its prior motion for reargument. The billing records disclose that Petitioner was purportedly charged $4,483 for 25.55 hours of work primarily performed by law clerks to bring *BDO Seidman* to this Court's attention.

By opinion dated November 6, 2002, (311 F.3d 1077) the Eleventh Circuit rescinded part of its July Order (the "November Opinion") and held that, while there was no controlling authority when it issued its July Opinion, *BDO Seidman* now represented Florida law on the issue of whether Fla. Stat. §768.79 applied in a federal diversity case litigated in Florida where the substantive issues were governed by the law of another state. Accordingly, this Court reversed its prior opinion and held that attorney's fees were recoverable by Petitioner.

Petitioner then moved for appellate fees again by petition filed on November 18, 2002 asking for appellate fees of

$103,901.14 (Pet. App. 98a). Respondents opposed the application on a number of grounds. The Eleventh Circuit agreed with the reasons set forth in respondents' opposition, and denied the motion for appellate fees in its order filed February 4, 2003 (Pet. App. 3a). The Eleventh Circuit also denied petitioner's motion for reconsideration of the denial of fees and for recall of the mandate (Pet. App. 1a).

REASONS FOR DENYING THE PETITION FOR A WRIT OF MANDAMUS

Petitioner concedes that the issuance of a writ of mandamus "is not a matter of right, but of discretion sparingly exercised." Supreme Court Rule 20.1 (Pet. 17)

Petitioner can not justify the granting of a writ of mandamus. "To justify the granting of any such writ, the petition must show that [1] the writ will be in aid of the Court's appellate jurisdiction, [2] that exceptional circumstances warrant the exercise of the Court's discretionary powers, and [3] that adequate relief cannot be obtained in any other form or from any other court." Supreme Court Rule 20.1

A. There Is No Justification for Granting the Writ of Mandamus

(1) Petitioner Admits There Was Another Remedy Available

The most obvious reason to deny petitioner's request for the issuance of a writ of mandamus, is that he admits that he had another remedy available, namely to file a petition for a writ of certiorari from the various orders denying him attorney's fees (Pet. 18). The stated reason for failing to file a petition for certiorari was that relief for certiorari was only

granted "in a tiny fraction of cases." This argument is specious given this Court's rule that a writ of mandamus is granted only "sparingly", as opposed to a writ of certiorari which is granted as a matter of "discretion". *(Cf.* Supreme Court Rules 10 and 21)

Further, it is obvious that petitioner waived any remedy available through a writ of certiorari, in that he failed to file a timely petition for such a writ within ninety days after entry of the orders appealed from. (Supreme Court Rule 13.1).

Petitioner cannot intentionally default in seeking another remedy and then use his own dereliction as a reason that no other remedy is available. Notably, petitioner fails to explain the reason for totally failing to seek relief from the December 11, 2001 and July 13, 2002 denials of petitioner's motions for appellate fees much less an explanation of why he waited over five months to seek relief from the Eleventh Circuit's February 4, 2003 and March 28, 2003 orders denying him attorney's fees.

Since granting a writ of mandamus is guided by equitable principles, laches is a ground for denial of a request for issuance of a writ of mandamus. *See NBS Imaging Systems, Inc., v. United States District Court for the E. Dist. Of Cal.*, 841 F.2d 297, 298 (9th Cir. 1988) (petitioner delayed in filing petition and court was reluctant to grant writ.) Here, for over five months, respondents have relied on being told by a United States Circuit Court of Appeals over and over that they are not responsible for the excessive amount of appellate legal fees petitioner seeks. To change that holding at this late date will prejudice respondents.

Here, equity should preclude the granting of a writ of mandamus on the grounds of laches.

(2) There Are No Exceptional Circumstances Warranting Issuance of a Writ of Mandamus

The Eleventh Circuit Court of Appeals did not abuse is discretion in deciding petitioner's motions for fees against it without reasons stated in an opinion. The court of appeals had a motion before it and decided it. While a writ of mandamus may lie where a court has failed to decide a motion and render a judgment, where as here, the court decided the motion before it and rendered judgment, a writ of mandamus is not available to change the judgment, "erroneous or not". *See, In Re Many,* 55 U.S. 24, 25 (1852). That is because mandamus is restricted to situations where ministerial duties of a nondiscretionary nature are involved. *Panama Canal Co. v. Grace Line, Inc.,* 356 U.S. 309, 78 S.Ct. 752 (1958). *Accord: Weber v. Coney,* 642 F.2d 91 (5th Cir. 1981).

Further, there is no rule mandating that the Eleventh Circuit Court of Appeals must state its reasons for the granting or denial of a motion for appellate attorney's fees over which it has the sole authority to decide. Here, having to expressly state the reasons for denial of a motion for appellate attorney's fees are particularly irrelevant since, as petitioner concedes (Pet. 18), it is the circuit court alone which has the authority to set the amount of appellate fees incurred before it. (Pet. 18); *Davidson v. City of Avalon Park,* 848 F.2d 172 (11th Cir. 1988).

Moreover, petitioner implicitly agrees (Pet. 2) that appellate fees are awarded under Fla. Stat. §768.79, by virtue of Fla. Stat. §59.46, to the *prevailing party*. *See also, Krys v. Lufthansa,* 119 F.3d 1515, 1530 (11th Cir. 1997). In fact, petitioner posits as his first "guess" at a possible unstated reason for the denial of fees is because the Eleventh Circuit

Court of Appeals did not view petitioner as the "prevailing party" as required for recovery of appellate attorney's fees under Fla. Stat. §768.79. The Eleventh Circuit obviously did not view petitioner as the "prevailing party" where there was merely a change in the law after the parties briefed their positions with the Court and after the Court had already ruled in respondents' favor.

Here, petitioner had won on the issue of summary judgment, but lost on the issues of whether respondents were liable under 28 U.S.C. §1927 and under Fla. Stat. §57.105. Petitioner was also unsuccessful on the issue of attorney's fees under Fla. Stat. §768.79 throughout all the briefing period. By happenstance, a decision the Eleventh Circuit Court of Appeals felt was controlling in the absence of any other authority came along the very day that court denied petitioner's request for rehearing after losing on the attorney's fee issue. The Eleventh Circuit thus decided that petitioner was not the prevailing party.

Petitioner's assertion that the Eleventh Circuit had no discretion to do anything but award appellate attorney's fees to petitioner is incorrect. "Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188 (1980) (citations omitted). Mandamus simply will not lie to compel adjudication in a particular way a party wants. *Interstate Commerce Commission v. U.S. ex rel. Campbell*, 289 U.S. 385, 53 S.Ct. 607 (1933).

For these reasons alone, the petition for mandamus must be denied since the Eleventh Circuit acted well within is jurisdiction and power.

(3) There is No "Appellate Jurisdiction" Over The

Fees Issue

It is the Court of Appeals that has the only authority to set legal fees. Therefore, even if this Court were to remand the case back to the Eleventh Circuit for a fuller statement of reasons why it denied petitioner's motions for appellate attorney's fees, petitioner would still not be entitled to any further relief since it is the Circuit Court, not this Court which has the authority to set the amount of fees. Moreover, without any further remedy, there is no point in issuing a writ of mandamus to make the Eleventh Circuit go through a worthless exercise.

Under 28 U.S.C. §1651(a), an extraordinary writ such as mandamus may issue only if it is necessary or is appropriate in aid of jurisdiction. *See also, Turner Broadcasting Sys. v. FCC*, 507 U.S. 1301, 113 S.Ct. 1806, 1807 (1993).

Here, an extraordinary writ is not necessary, nor does it aid the appellate jurisdiction of this Court. Nor can an extraordinary writ enlarge the jurisdiction of a court under the 28 U.S.C. §1651 where, as here, petitioner admittedly could have brought a petition for certiorari. *See generally, Clinton v. Goldsmith,* 526 U.S. 529, 537, 119 S.Ct. 1538 (1999).

B. Grounds Lay in the Record for Denial of Petitioner's Motion for Appellate Attorney's Fees

Further, remand for clarification, which is what petitioner is asking for here, is not required, where it is clear from the record that the lower court accepted an opponent's arguments found in the record. *See, e.g., Ross Brothers Construction Co., Inc. v. International Steel Services, Inc.*, 283 F.3d 867, 873 (7th Cir. 2002). *Accord: U.S. v. Nonahal*, 338 F.3d 668 (7th Cir. 2003). The Eleventh Circuit obviously denied petitioner's

motions for appellate fees for the reasons set forth in respondents' opposition to the initial motion and the motion for reconsideration. See, App. 1a-25a. Respondents made a number of arguments, which are described below.

(1) Any Claim for Costs Was Untimely

Petitioner sought to recover $100,658.83 in appellate fees and $3,242.31 in costs. In their opposition, respondents argued *inter alia*, that petitioner was foreclosed from seeking costs under Fed.R.App.P. Rule 39 due to untimeliness. Rule 39(d)(1), Fed.R.App.P., provides that "[a] party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs." The Eleventh Circuit's Internal Operating Procedure "1" for Fed.R.App.P. Rule 39 confirms the 14 day requirement and also provides that "[t]he filing of a petition for rehearing or petition for rehearing *en banc* does not extend the time for filing a bill of costs."

If petitioner ever wanted costs taxed in his favor, he was required to, but did not, file such a request by July 24, 2001 in connection with the July Opinion. Petitioner apparently never sought costs in connection with the November Opinion. Additionally, the Clerk of the Eleventh Circuit Court of Appeals determined that "[e]ach party to bear its own costs", recognizing that these consolidated appeals netted a mixed result for both parties.

(2) The Eleventh Circuit Had Already Denied Petitioner's Prior Fee Applications

Respondents argued that the Eleventh Circuit had already held that petitioner was not entitled to appellate attorney's fees. Petitioner previously moved for appellate attorney's fees

in connection with appeals of the District Court's grant of summary judgment and attorney's' fees under Fla. Stat. §768.79. The motions were fully briefed by the parties. As discussed *infra*, the motions were denied by Orders entered December 11, 2001 and July 13, 2002, respectively.

To the extent that the Eleventh Circuit rescinded that portion of its July 10, 2001 decision concerning the applicability of Fla. Stat. §768.79, *at most* Petitioner might be entitled to appellate attorney's fees only insofar as he expended fees on his second petition for rehearing relating to the impact of the *BDO Seidman* opinion. Appellants had won on the issue of the applicability of Fla. Stat. §768.79. Appellants cannot be held accountable for a change in Florida law occurring *after* the July Opinion.

However, on the present record, and as explained below, Petitioner is entitled to no appellate fees for work done in connection to its successful application for rehearing.

(3) The Fla. Stat. §768.79 Does Not Allow "Fees for Fees"

Respondents argued below that even if petitioner could recover attorney's fees in connection with the Eleventh Circuit's reversal of its prior opinion, petitioner would not be entitled to appellate fees on the present record. He sought to recover $100,658.83 in appellate fees and $3,242.31 in costs. This totals approximately 50% of the amount Petitioner claimed to have expended in defending this action at the District Court level through the eve of trial which has already been awarded. This unconscionable claim is premised on time mostly expended in arguing about the amount of attorney's fees, the so-called "fees for fees", which cannot be recovered. Petitioner consequently asserts that he cannot distinguish

between time expended for work obtaining the reversal of this Court's prior denial of attorney's fees and the amount of those fees. Accordingly, all fee claims should be denied. The maximum amount of attorney's fees to which petitioner might have been entitled is $4,483.

To conceal this small amount, petitioner argued that he is entitled to counsel fees and expenses in litigating the amount of attorney's fees. Petitioner further represented that he was unable to separate those fees in connection with substantive matters from the fees resulting from his litigation of the amount of attorney's fees.

There is no doubt that petitioner was not entitled to seek "fees for fees" regardless if the fees are for a case in chief *or on appeal*. Thus, the Eleventh Circuit in its November 6, 2002 decision (311 F.3d at 1085-1086) quoted from *State Farm Fire & Cas. Co., v. Palma,* 629 So.2d 830, 833 (Fla.1993) in holding that "'[t]he Florida State Supreme Court has held that, while attorney's fees incurred for litigating the issue of entitlement to attorney's fees are recoverable, fees incurred for litigating the amount of the fees are not.'"

In the face of this overarching holding in *Palma,* there is no authority to support petitioner's contention that Florida law is unclear as to whether the "fees for fees" prohibition does not apply to appellate "fees for fees". The Eleventh Circuit stated as much when it adopted *Palma* in rejecting petitioner's prior claim for appellate attorney's fees. This Court stated that the (311 F.3d at 1085-1086) "... purpose [of Fla. Stat. §768.79] does not include encouraging the representation of indigents and does not support an award of attorney's fees incurred litigating the amount of those fees." Although *Palma* concerned a contingency fee application, the Eleventh Circuit rejected petitioner's attempt to distinguish

Palma on that basis (311 F.3d at 1085-1086). Moreover, there is no doubt that *Palma* applies to applications under Fla. Stat. §768.79. *Oruga Corporation, Inc. v. AT&T Wireless of Florida, Inc.*, 712 So.2d 1141, 1145 (Fla. 3d DCA 1998)(stating that the reasoning in Palma applies to an analysis under §768.79). As noted in *Oruga, supra,* "[s]uch work inures exclusively to the attorney's benefit,...."

Nor was there any authority to support petitioner's contention that the purpose of Fla. Stat. §768.79 is to prevent opponents from filing objections to fee applications

(4) There Was No Showing That Petitioner Has Paid Any Portion of the Fees Demanded and Certain Amounts Claimed Are Not Recoverable

Petitioner's claim for fees should also be denied because there is no showing that Petitioner has paid any portion of the fees which are the subject of the instant motion. There is a balance stated on each bill and no reflection of any payment having been made.

Undoubtedly, this is because most of the time was expended in arguing the amount of attorney's fees to which Petitioner's counsel is entitled. These Statements are particularly suspect in light of the fact that they represent 50% of the total amount claimed for work on the District Court level.

Given that petitioner's counsel previously discounted prior bills, this suggests that counsel's bills may not be the final amount charged to Petitioner.

Petitioner has not only improperly sought fees in connection with its fee claims, but also the costs of Lexis charges. Such charges are not allowable since that "'would be

tantamount to charging the losing party for the prevailing party's law library books.'" *Texler v. County of Summit*, 25 F.3d 1050 (6th Cir. 1994). Similarly improper are claims for general office expenses such as long distance telephone calls and delivery services. These charges are considered to be office overhead not to be passed on to an adversary in a claim for fees. *See, e.g., Seminole County v. Chandrinos*, 816 So.2d 1241 (Fla. 5th DCA 2002).

Therefore, based on the instant record, and even if Petitioner were entitled to recover attorney's fees for bringing *BDO Seidman* to this Court's attention, Petitioner is not entitled to any appellate fee award.

CONCLUSION

For the foregoing reasons, petitioner's request that this Court issue a writ of mandamus to the Eleventh Circuit Court of Appeals and individually to Judges Marcus, Carnes and Hand should be denied in all respects.

Dated: September 11, 2003

Respectfully submitted,

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Attorneys for Respondents

APPENDIX

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

Case No.: 00-10323
00-14728-FF
00-14990-FF

NEMESIS VERITAS, L.P. f/k/a
MCMAHAN & COMPANY AND
D. BRUCE MCMAHAN

Plaintiffs - Appellants/
Cross-Appellees

-v.-

WILLIAM A. TOTO,

Defendant- Appellee/
Cross-Appellant.

APPELLANTS' RESPONSE TO "TOTO'S MOTION FOR RECONSIDERATION" DATED FEBRUARY 24, 2003

Plaintiffs-Appellants-Cross-Appellees ("Appellants") hereby respond to "Toto's Motion for Reconsideration of Denial of Appellate Fees and Expenses as Contrary to Florida Law and for Partial Recall of Mandate" dated February 24, 2003, and state as follows:

1. Defendant-Appellee-Cross-Appellant Toto has improperly couched his request for relief as a "motion" pursuant to Rule 40, Fed. R. App. P. There is no procedure for a "motion" to be filed under Rule 40. Rule 40, Fed.R.App.P., relates to the filing of a petition for panel rehearing, and no response is allowed unless the Court so requests. Rule 40(a)(3), Fed.R.App.P. Here, Toto has misleadingly labeled his submission as a motion, and the Clerk has requested that responsive papers be filed by March 10, 2003. Therefore, we respond at the Clerk's direction without knowing if the Court desired a response or not.

2. It should also be noted that Toto's request for relief pursuant to Rule 40, Fed.R.App.P., has been made to the original panel, not pursuant to Rule 35, Fed.R.App.P., for *en banc* reconsideration. Further, insofar as Toto seeks a partial recall of the mandate, such a motion is heard by a single judge. *See* 11th Cir. R. 27-1 (d); Rule 41, IOP 1.

3. Toto's petition for panel rehearing should be denied. Eleventh Circuit Rule 41-1(b) states: "A mandate once issued shall not be recalled except to prevent injustice." Therefore, the sole issue before this Court is whether the denial of fees constitutes an injustice.

4. This panel's Order denying fees evidences that it would have been an injustice to grant the over $100,000 in additional fees requested by Toto. As the panel will recall, this Court initially denied attorney's fees under Fla. Stat. §768.79. However, months after this Court's determination, and after the decision had been printed in the hard covered case books, the intermediate Florida appellate court decided *BDO Seidman v British Car Auctions,* 802 So.2d 366 (Fla. 4th DCA 2001) which caused this Court to amend its opinion to grant

attorney's fees. Thereafter, Toto sought over $100,000 in additional attorney's fees for basically shepardizing this Court's decision, finding that *BDO Seidman* had disagreed with it and bringing *BDO Seidman* to this Court's attention.

5. Accordingly, this Court emphatically stated in denying additional attorney's fees:

> The motion for litigation expenses is DENIED.
>
> The alternative motion to find Appellee entitled to attorney's fees is DENIED.
>
> The alternative motion for remand is DENIED.
>
> This appeal is over.

A copy of this Court's denial is annexed hereto as Exhibit "A".

6. Moreover, there is nothing new in Toto's "motion" that has not already been considered by this Court. Accordingly, for brevity's sake, appellants hereby submit a copy of their papers previously submitted in opposition to Toto's last request for fees and incorporates the substance herein as their further response to Toto's "motion" for reconsideration. See Exhibit "B" hereto.

7. For the foregoing reasons and for the reasons set forth in Exhibit "B" hereto, appellants respectfully request that this Court deny Toto's request for relief.

Dated: March 8, 2003

Respectfully submitted,
ISAACS & EVANS, LLP

By: /s/ Patti E. Evans
PATTI E. EVANS
Attorneys for appellants
521 Fifth Avenue, 17th floor
New York, New York 10175

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was mailed this 8th day of March 2003 to the attorneys for defendant-appellee-cross-appellant: Hendrik G. Milne, Esq., Aballi, Milne, Kalil & Escagedo, P.C., 2250 SunTrust International Center, One Southeast Third Avenue, Miami, Florida 33131, and a copy of same was served by the same method to Stanley A. Beiley, Esq., Sacher, Hartman & Waldman, P.A., 1401 Brickell Avenue, Suite 700, Miami, FL 33130-9543.

By: /s/ Patti E. Evans
PATTI E. EVANS

EXHIBIT A

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

Case No.: 00-10323
00-14728

D. BRUCE MCMAHAN
NEMESIS VERITAS,
f.k.a. MCMAHAN & COMPANY

Plaintiffs - Appellants
Cross-Appellees

-v.-

WILLIAM A. TOTO,

Defendant- Appellee
Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

BEFORE: CARNES and MARCUS, Circuit Judges, and HAND[1], District Judge.

BY THE COURT:

Appellee's "Petition for Appellate Fees and Costs...," construed as a petition for attorney's fees and litigation expenses, or in the alternative as a motion to find Appellee entitled to the same and to remand to district court to determine the amount to be awarded, is before the Court.

The motion for litigation expenses is DENIED.

The alternative motion to find Appellee entitled to attorney's fees is DENIED.

The alternative motion for remand is DENIED.

The appeal is over.

---

[1] The Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

EXHIBIT B

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

Case No.: 00-10323
00-14728
00-14990

USDC Case No: 96-8294

NEMESIS VERITAS, L.P. f/k/a
MCMAHAN & COMPANY AND
D. BRUCE MCMAHAN

Plaintiffs - Appellants
Cross-Appellees

-v.-

WILLIAM A. TOTO,

Defendant- Appellee
Cross-Appellant.

APPELLANT'S OBJECTIONS TO APPELLEE'S PETITION FOR APPELLATE FEES AND COSTS AND MOTION FOR DIRECTIONS DATED NOVEMBER 16, 2002

Plaintiff's-Appellants-Cross-Appellees ("Appellants") hereby respond to Defendant-Appellee-Cross-Appellant Toto's Petition for Appellate Fees and Costs and Motion for Directions with Verified Bill of Fees, Costs and Supporting Affidavit and state as follows.

1. Toto's application for appellate fees and costs should be denied for the following reasons. First, there is presently pending a petition for *en banc* review of this Court's reversal of its denial of attorney's fees. Therefore, this Court's decision awarding attorney's fees will not be final until Appellants' petition is decided. *En banc vacatur* of that determination would moot the instant application.

2. Second, with respect to costs, Toto's application is untimely under Rule 39, Fed.R.App.P. and Internal Operating Procedure "1" thereunder. Toto never previously applied to recover costs and is foreclosed from seeking those costs now.

3. Third, this court has already denied Toto appellate fees under orders entered December 11, 2001 (Ex. "A") and July 13, 2001 (Ex. "B").

4. Fourth, even if Toto could recover attorney's fees in connection with this Court's reversal of its prior opinion, Toto would not be entitled to appellate fees on the present record. He has sought to recover $100,658.83 in appellate fees. This totals approximately 50% of the amount Toto claimed to have expended in defending this action at the District Court level through the eve of trial which has already been awarded. As explained below, this unconscionable claim is premised on time mostly expended in arguing about the amount of attorney's fees, the so-called "fees for fees", which cannot be recovered. Toto consequently asserts that he cannot distin-

guish between time expended for work obtaining the reversal of this Court's prior denial of attorney's fees and the amount of those fees. Accordingly, all fee claims should be denied.[1]

5. Moreover, the Statements provided by Toto evidence no payment by Mr. Toto. This is undoubtedly because most of the time was expended in arguing the amount of attorney's fees to which Toto's counsel is entitled. Considering that Toto's counsel has discounted prior bills, it appears that the Statements submitted may not be the final amount charged to Toto.

6. Fifth, at most Toto is entitled to $4,483 in appellate fees. This is the amount it cost Toto to cause this Court to reverse its prior opinion by bringing to the Court's attention the Florida District Court opinion in *BDO Seidman v. British Car Auction, Inc.* 802 So. 2d 366 (Fla 4th DCA 2001) which was decided after this Court's decision denying attorney's fees, but prior to issuance of the mandate.

BACKGROUND AND PRIOR PROCEEDINGS

7. This was an action for tortious interference with contractual relations. Toto caused former limited partners of appellant Nemesis Veritas L.P. to sue it and appellant D. Bruce McMahan under, *inter alia,* the Racketeer Influenced and Corrupt Organizations Act in violation of assignments and releases contained in Contracts of Sale and Security

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[1] To further complicate matters, Toto has included in the instant application additional fees for District Court work which he has not sought to separate from the appellate fees (Milne Verified Bill, ¶ 5). Toto himself admits that this Court lacks jurisdiction to make an award of fees for District Court work.

Agreements (the "Contracts") whereby said limited partners sold their interests to appellants. The action sought $30 million in damages.[2]

8. The consolidated appeals and cross-appeals in this case concerned various orders of the United States District Court for the Southern District of Florida. They were decided by this Court's July 10, 2001 opinion, 256 F.3d 1120 (11th Cir. 2001), *amended* F.3d , 2002 WL 31477305 (11th Cir. 2002) (the "July Opinion"). The July Opinion: (1) affirmed the District Court's grant of summary judgment dismissing the complaint and therefore denied a portion of Appellants' appeal; (2) reversed the District Court's grant of attorney's fees pursuant to Fla. Stat. §768.79 and therefore granted that part of Appellants' appeal; and (3) affirmed the trial court's denial of sanctions against Appellants and their counsel.

9. In orders entered December 11, 2001 (Ex. "A") and July 13, 2001 (Ex. "B"), Toto was denied appellate attorney's fees. All fee claims other than those contained in the bills dated December 21, 2001 and February 8, 2002 (Milne Verified Bill, Exs. "I" and "J") were thereby decided adversely to Toto. Toto never applied to recover costs.

10. Prior to the issuance of the mandate, and on September 30, 2001, *BDO Seidman v. British Car Auction, Inc.*, 802 So.2d 366 (Fla 4th DCA 2001), was decided. *BDO Seidman* contradicted this Court's holding in the instant case that Fla. Stat. §768.79 did not apply in a diversity case litigated in Florida where the substantive issues were gov-

---

[2] In support of his claim for inflated counsel fees, Toto repeatedly mischaracterizes the claim as one for $90 million.

erned by the law of another state. *Seidman* specifically refused to apply a conflict of laws analysis as required under Federal law. *Seidman* cited to this Court's decision and was undoubtedly "picked up" by shepardizing this case.

11. Toto thereupon renewed its prior motion for reargument. The billing records disclose that Toto was purportedly charged $4,483 for 25.55 hours of work primarily performed by law clerks to bring *BDO Seidman* to this Court's attention, *see* Milne Verified Bill Ex. "I", entries 11/15 - 11/20/01.

12. By opinion dated November 6, 2002, this Court rescinded part of its July Order (the "November Opinion") and held that, while there was no controlling authority when it issued its July Opinion, *BDO Seidman* now represented Florida law on the issue of whether Fla. Stat. §768.79 applied in a federal diversity case litigated in Florida where the substantive issues were governed by the law of another state. Accordingly, this Court reversed its prior opinion and held that attorney's fees were recoverable by Toto.

13. Immediately after that decision, Appellants petitioned for *en banc* reconsideration. Appellants contended that, in reversing its prior opinion denying attorney's fees, the panel contradicted federal law by applying the law of the forum state without conducting the required choice of law analysis. Appellants' petition is currently pending.

ARGUMENT

A. TOTO'S MOTION IS PREMATURE

14. Toto's motion is premature. This Court's November 6, 2002 decision granting Toto attorney's fees will not be final

until Appellants' petition for rehearing *en banc* has been decided. Fed.R.App.P. Rule 41(d) (1) provides for an automatic stay of the mandate on a timely filing of a petition for rehearing or *en banc* review. Therefore, this Court cannot reach the issue of attorney's fees and costs until it decides Appellants' petition for rehearing *en banc*.

B. TOTO CANNOT RECOVER COSTS

15. Toto is foreclosed from seeking costs under Fed.R.App.P. Rule 39 at this late date. Rule 39 (d) (1), Fed.R.App.P., provides that " [a] party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs." This Court's Internal Operating Procedure "1" for Fed.R.App.P. Rule 39 confirms the 14 day requirement and also provides that "[t]he filing of a petition for rehearing or petition for rehearing *en banc* does not extend the time for filing a bill of costs."

16. Therefore, if Toto wanted costs taxed in his favor, he was required to, but did not, file such a request by July 24, 2001. Additionally, the Clerk of this Court has determined that "[e]ach party to bear its own costs" (Exhibit "A" hereto), recognizing that these consolidated appeals netted a mixed result for both parties.

C. THIS COURT HAS ALREADY DETERMINED THAT TOTO IS NOT ENTITLED TO APPELLATE FEES

17. This Court has already held that Toto is not entitled to appellate attorney's fees. Toto previously moved for appellate attorney's fees in connection with appeals of the District Court's grant of summary judgment and attorney's fees under

Fla. Stat. §768.79. The motions were fully briefed by the parties. The motions were denied by Orders entered December 11, 2001 (Ex., "A") and July 13, 2001 (Ex. "B"), respectively.

18. To the extent that this Court rescinded that portion of its July 10, 2001 decision concerning the applicability of Fla. Stat. §768.79, at *most* Toto might be entitled to appellate attorney's fees only insofar as he expended fees on his second petition for rehearing relating to the impact of the *BDO Seidman* opinion. Prior to the decision in *BDO Seidman*, Appellants had succeeded in reversing the lower court on the issue of the applicability of Fla. Stat. §768.79. This Court therefore denied Toto's application for attorney's fees. Appellants should not be held accountable for a change in Florida law occurring *after* the July Opinion.

19. However, on the present record, and as explained below, Toto is entitled to no appellate fees for work done in connection with its successful application for rehearing.

D. TOTO IS ENTITLED TO NO FEES BASED ON THE PRESENT RECORD

i) Toto has not distinguished between the time it expended in bringing *BDO Seidman* to the Court's attention and the time expended in litigating the amount of fees to which he is purportedly entitled

20. The maximum amount of attorney's fees to which Toto might be entitled is $4,483. To conceal this small amount, Toto argues that he is entitled to counsel fees and expenses in litigating the amount of attorney's fees. Toto further represents that he is unable to separate those fees in

connection with substantive matters from the fees resulting from his litigation of the amount of attorney's fees.

21. There is no doubt that Toto is not entitled to seek "fees for fees" regardless if the fees are for a case in chief or on *appeal*. Thus, in its November 6, 2002 decision (2002 WL 31477305 at *7), this Court quoted from *State Farm Fire & Cas. Co., v. Palma*, 629 So.2d 830, 833 (Fla. 1993) in holding that " '[t]he Florida State Supreme Court has held that, while attorney's fees incurred for litigating the issue of entitlement to attorney's fees are recoverable fees incurred for litigating the amount of the fees are not.' "

22. In the face of this overarching holding in *Palma*, there is no authority to support Toto's contention that Florida law is unclear as to whether the "fees for fees" prohibition does not apply to appellate "fees for fees". This Court has stated as much when it adopted *Palma* in rejecting Toto's prior claim for appellate attorney's fees. This court stated that the (2002 WL 31477305 at *7) "... purpose [of Fla. Stat. §768.79] does not include encouraging the representation of indigents and does not support an award of attorney's fees incurred litigating the amount of those fees." Although *Palma* concerned a contingency fee application, this Court rejected Toto's attempt to distinguish *Palma* on that basis (2002 WL 31477305 at *8). Moreover, there is no doubt that *Palma* applies to applications under Fla. Stat. §768.79. *Oruga Corporation, Inc. v. AT&T Wireless of Florida, Inc.*, 712 So. 2d 1141, 1145 (Fla. 3d DCA 1998) (stating that the reasoning in *Palma* applies to an analysis under §768.79). As noted in *Oruga*, supra, "[s]uch work inures exclusively to the attorney's benefit,..."

23. Nor is there any authority to support Toto's contention that the purpose of Fla. Stat. §768.79 is to prevent

opponents from filing objections to fee applications. To argue that Appellants were wrong in objecting to the amount of fees sought by Toto when each objection was fully supported by case law is absurd. Indeed, as admitted by Toto, this Court sustained many of those objections. The procedure in the District Court and in this Court provides for objections to be filed in opposition to another party's application for fees and costs. This Court cannot punish Appellants for filing objections allowed under the rules. Certainly, if attorney fees had been awarded Appellants, Toto would have filed the same type of objections and cited the same cases as Appellants did.

ii) There is no showing that Toto has paid any portion of the fees demanded and certain amounts claimed are not recoverable.

24. Toto's claim for fees should also be denied because there is no showing that Toto has paid any portion of the fees which are the subject of the instant motion. There is a balance stated on each bill and no reflection of any payment having been made.

25. Undoubtedly, this is because most of the time was expended in arguing the amount of attorney's fees to which Toto's counsel is entitled. These Statements are particularly suspect in light of the fact that they seek approximately 50% of the total amount claimed for work on the District Court level despite the fact that all appellate work pre-*BDO Seidman* was a rehash of the arguments made in the District Court.

26. Given that Toto's counsel previously discounted prior bills, this suggests that counsel's bills may not be the final amount charged to Toto.

27. Toto has not only improperly sought fees in connection with its fee claims, but also the costs of Lexis charges. Such charges are not allowable since that " 'would be tantamount to charging the losing party for the prevailing party's law library books.' " *Texler v. County of Summit*, 25 F. 3d 1050 (6th Cir. 1994). Similarly improper are claims for general office expenses such as long distance telephone calls and delivery services. These charges are considered to be office overhead not to be passed on to an adversary in a claim for fees. *See, e.g., Seminole County v. Chandrinos*, 816 So.2d 1241 (Fla. 5th DCA 2002).

28. Therefore, based on the instant record, and even if Toto were entitled to recover attorney's fees for bringing *BDO Seidman* to this Court's attention, Toto is not entitled to any appellate counsel fees based on the instant record.

E. TOTO IS ENTITLED TO AT MOST $4,483 AND NOT THE $100,658.83 SOUGHT BY TOTO

29. As explained above, the maximum amount of attorney's fees to which Toto might be entitled is $4,483. This represents the fees charged for presenting *BDO Seidman* to this Court and obtaining the reversal of this Court's previous denial of attorney's fees.

30. As explained above, under no circumstances should this Court reverse its prior determinations and award Toto appellate counsel fees for work performed prior to *BDO Seidman*.

31. Nevertheless, even if Toto were entitled to appellate counsel fees for work performed prior to the rendering of *BDO Seidman*, he could not be entitled to the $100,658.83 sought.

32. First, this amount represents approximately 50% of the total fees asserted at the District Court level to have been generated as a result of full discovery, two motions for summary judgment and completed trial preparation.[3] It is therefore unconscionable.

33. Second, the work performed by Toto's counsel, to the extent it concerns substantive matters, reflects those arguments made in the District Court. Their presentation on appeal was merely a "cut and paste" word processing exercise converting the briefs from the District Court into appellate form.

34. Third, Toto has included in the instant application additional fees for District Court work which he has not sought to separate from the appellate fees (Milne Verified Bill, ¶5). Toto himself admits that this Court lacks jurisdiction to make an award of fees for District Court work.

35. Fourth, even if fees are granted retroactively in connection with appellate work, Toto was ultimately successful only in opposing Appellants' appeal of the dismissal of the complaint. While Toto has been so far successful in sustaining the District Court's grant of attorney's fees based on the subsequently decided *BDO Seidman* opinion was issued, Toto was totally unsuccessful in his cross-appeal of the denial of sanctions.

36. Therefore, if Toto is entitled to appellate fees prior to *BDO Seidman's* issuance, it should only be in respect of work performed in connection with the affirmance of the District

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[3] As explained above, summary judgment was granted by the District Court the day before trial was to have commenced.

Court's grant of summary judgement. This work is described in the Statement dated June 16, 2000 (Milne Verified Bill, Ex. "A") and amounts to $19,045 in fees.

37. Finally, this Court should decide the issue of appellate fees and costs on its own without referral to the District Court. Accordingly no award should be made on the present record.

Dated: December 28, 2002

Respectfully submitted,
ISAACS & EVANS, LLP

By: /s/ Patti E. Evans
PATTI E. EVANS
Attorneys for Appellants
10 East 39th Street
New York, New York 10016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was mailed this 30th day of December 2002 to the attorneys for defendant-appellee-cross-appellant: Hendrik G. Milne, Esq., Aballi, Milne, Kalil & Escagedo, P.C., 2250 SunTrust International Center, One Southeast Third Avenue, Miami, Florida 33131, and a copy of same was served by the same method to Stanley A. Beiley, Esq., Sacher, Hartman & Waldman, P.A., 1401 Brickell Avenue, Suite 700, Miami, FL 33130-9543.

By: /s/ Patti E. Evans
PATTI E. EVANS

EXHIBIT A

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

No. 00-14728

D. BRUCE MCMAHAN
NEMESIS VERITAS,
f.k.a. MCMAHAN & COMPANY

Plaintiffs - Appellants
Cross-Appellees

-v.-

WILLIAM A. TOTO,

Defendant- Appellee
Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Appellee's motion for appellate fees is hereby DENIED.

By: /s/ Ed Carnes

Ed Carnes

UNITED STATES

CIRCUIT JUDGE

EXHIBIT B

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT

No. 00-10323-FF
&
No. 00-14728-FF

D. BRUCE MCMAHAN
NEMESIS VERITAS,
f.k.a. MCMAHAN & COMPANY

Plaintiffs - Appellants
Cross-Appellees

-v.-

WILLIAM A. TOTO,

Defendant- Appellee
Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

BEFORE: CARNES and MARCUS, Circuit Judges, and HAND[1], District Judge.

BY THE COURT:

Appellee's motion to find him entitled to appellate attorney's fees in Appeal No. 00-10323 is DENIED.

Appellee's motion for remand in Appeal No. 00-10323 is DENIED AS MOOT.

Appellants' motion for reconsideration of the August 14, 2001, order striking their bill of costs in Appeal No. 00-14728 is DENIED.

Patti E. Evans
10 East 39th Street, Suite 531
New York, New York 10016

December 11, 2001

RE: 00-10323-FF
D. Bruce McMahan v William A. Toto
DC DKT NO.: 96-08294 CV-DMM

cc: Leigh R. Isaacs
cc: Patti E. Evans
cc: Hendrik G. Milne
cc: Richard A. Beiley
cc: Administrative File.

---

[1] The Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

UNITED STATES COURT OF APPEALS

THE ELEVENTH CIRCUIT
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

December 11, 2001

RE: 00-10323-FF
D. Bruce McMahan v William A. Toto
DC DKT NO.: 96-08294 CV-DMM

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

THOMAS K. KAHN, Clerk
Reply to: Carol P. Lewis
(404) 335-6175

Supreme Court, U.S.
FILED
OCT 2 - 2003
OFFICE OF THE CLERK

No. 03-173

In the

Supreme Court of the United States

IN RE: WILLIAM A. TOTO

Petition for a Writ of Mandamus to the
The United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF

Hendrik G. Milne
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Nemesis offers no plausible, legally permissible reason for the Eleventh Circuit's decision.

In the Petition, we posited three possible "guesses" for the Eleventh Circuit's peremptory denial of all appellate fees, without explanation. To these, Nemesis Veritas has added several more. However, as we show below, none of these possible "reasons" hold up under even a superficial analysis and are, therefore, highly unlikely to have been the unstated predicate for the Eleventh Circuit's Order.

First of all, there is no reason to believe, as Nemesis argues, that the Eleventh Circuit "agreed with the reasons" which Nemesis' proffered in opposition below and "obviously denied petitioner's motions for appellate fees for [such] reasons." See, Opposition Brief, pp. 3, 7 - 8. This is, first, because the Eleventh Circuit gave absolutely no reason for its decision and, second, because these arguments, rehashed here at Opposition Brief, pp. 8 - 12, are specious and illogical, relate primarily to the "amount" of fees to be awarded (as to which there *is* a discretion and which is *not* at issue here) and not to the right to an award in some amount (as to which there is *no* discretion and which *is* the issue here) and cannot be presumed to have been seriously entertained by the Eleventh Circuit for a single moment.

For instance, Nemesis surmises that perhaps the Eleventh Circuit did not regard Mr. Toto as the "prevailing party." See, Opposition Brief, pp. 5 – 6. However, the parties are agreed that Mr. Toto defeated Nemesis' claim for $30 million in compensatory damages. On this issue, Mr. Toto was, therefore, clearly the "prevailing party." Mr. Toto also defeated Nemesis'

claim for $60 million in punitive damages.[1] On this, too, Mr. Toto was therefore the "prevailing party." Mr. Toto also won the other major issue in the case, an entitlement to trial fees and expenses under Fla. Stat. § 768.79 and an award of substantially all such fees and expenses. On this too, Mr. Toto was therefore the "prevailing party." Nemesis nevertheless argues, that because the appellate court twice, incorrectly, refused fees before finally being persuaded to rule in Mr. Toto's favor, he was somehow *not* the overall "prevailing party," because he only won the fee issue "in the end." But that is exactly what "prevailing party" means, "the one who wins in the end." For the Eleventh Circuit to have predicated its ruling on any such reason as Nemesis suggests would have been, candidly, bizarre.

Another limb to the argument that Mr. Toto was not the "prevailing party" rests on the fact that although Mr. Toto won on the merits, and won substantially all his fees under Fla. Stat. § 768.79, he failed to persuade the Court of an entitlement to essentially *the same fees* under other statutory bases.[2] See, Opposition Brief at pp. 1, 6. However, Mr. Toto's arguments under these statutes were second and third strings to his bow on the fee issue, which he eventually won on his first-string argument under Fla. Stat. § 768.79. Prevailing on those additional statutory bases would not have gained Mr. Toto a single dollar over his Fla. Stat. § 768.79 award.

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[1] Nemesis has apparently, somehow, forgotten that it demanded $60 million in punitive damages in addition to its $30 million claim for compensatory damages throughout the case, from its initial Complaint, through its First Amended Complaint, and its final, Second Amended Complaint, on which summary judgment was entered, or it would not have stated in its brief that we have "repeatedly mischaracterized the claim as one of $90 million." See, Opposition Brief, p. 1, fn. 1.

[2] Fla. Stat. § 57.105, which sanctions frivolous litigation and 28 U.S.C. § 1927 which sanctions vexatious litigation.

Losing on those subsidiary arguments did not cost Mr. Toto a single dollar. For the Eleventh Circuit to have considered, as Nemesis argues, that the failure to recover on such subsidiary issues rendered the ultimate result a "draw," despite Mr. Toto's defeat of damage claims totaling $90 million and his recovery of substantially all fees requested, would have been outright capricious.

Nemesis also argues that because Mr. Toto was denied appellate fees by the Eleventh Circuit in the course of this appeal, following the initial ruling that Fla. Stat. § 768.79 *did not apply*, that the Court should not have revisited the matter after it reversed itself and held that Fla. Stat. § 768.79 *did apply*, at the end of the appeal. This is as absurd as the foregoing reasons. The facts are as follows. Prior to the first appellate decision in July 2001, Mr. Toto filed a motion seeking appellate attorneys fees and costs under Fla. Stat. § 768.79, in the event that the Court affirmed the District Court on the merits of the $90 million claim and affirmed that the fee statute applied. As it happened, in July 2001, the Eleventh Circuit affirmed on the merits, *but held that the fee statute did not apply*. Given this predicate ruling, Mr. Toto had no entitlement to appellate fees under the statute and the Court properly denied him fees at that time.[3] However, as we know, in the course of the same appeal, the Eleventh Circuit later reversed that predicate ruling and, in November 2002, held that Fla. Stat. § 768.79 *did* apply. As a result of this decision, given Mr. Toto's timely petition, an award of appellate fees in *some* amount became a matter of right which the

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[3] Contrary to Nemesis' argument at Opposition Brief p. 4, given the continuing pendency of proceedings in the Eleventh Circuit for many months thereafter, there was no immediate right of applelate review by this Court, or even a predicate for such review, at the time such fee orders were entered.

Court had no discretion to refuse. Refusal to act on that clear entitlement constituted clear error and an abuse of power.

On this last point of "right" and "discretion" regarding "fees and expenses" under Fla. Stat. § 768.79, and "discretion" as to "taxable costs" under Fed.R.App.P. 39, there is a basic confusion that permeates Nemesis' brief. As the parties agree, Mr. Toto filed an application for fees and expenses, which is generally governed by Fla. Stat. § 768.79 and, at least as to timing, by Fed.R.App.P. 39(d)(1).[4] As the parties are also agreed, Mr. Toto never filed a separate application for "taxable costs,"[5] which would generally be allocated in accordance with Fed.R.App.P. 39(a). Once a Court has determined the existence of the basic criteria for "entitlement" to fees under Fla. Stat. § 768.79, as the Eleventh Circuit did in this case, an award of trial *and* appellate fees is a matter of right and the sole discretion a Court possesses is to determine a "reasonable amount." See, Petition, pp. 8 – 11. Any "discretion" under Fed.R.App.P. 39, if it applies at all to such fee award, is by the terms of the rule itself (which states that it applies unless "the law . . . provides otherwise") subordinate to the mandate of the State statute. It is clear, therefore, that the Eleventh Circuit had no discretion to refuse entry of a fee award in *some* amount.

Four pages of the Opposition brief are, nevertheless devoted to reasons why Mr. Toto's claim for fees and expenses in the sum of $103,901.14 was excessive, which would, according to Nemesis, apparently have justified the Eleventh Circuit in refusing *all* appellate

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[4] See, Petition, p. 11, fn. 11.

[5] See, Opposition Brief, p. 2.

fees. See, Opposition Brief, pp. 9 – 12. This argument is predicated on the alleged fact that fees attributable to litigating "amount" as opposed to "entitlement" are not recoverable; on the alleged failure to show that Mr. Toto had actually paid the fees and expenses demanded; and on the alleged fact that certain relatively minor items of expense, such as LEXIS charges, are not legally recoverable. First of all, we observe parenthetically, the total amount requested reflected a 10% reduction to account for time spent on debating the "amount" of, as opposed to "entitlement to," an award.[6] Second, whether or not the client has paid the fees is irrelevant to the right to recover, and Nemesis cites no law to the contrary. Moreover, as plainly stated in the affidavit of the undersigned, Mr. Toto had, at that time, paid his counsel over $450,000.00 in regard to fees and expenses.[7] More importantly for present purposes, the issue is not whether the Eleventh Circuit had a discretion, bounded by the law and by reason, to determine a reasonable fee for Mr. Toto's expense in having his counsel brief the $90 million merits appeal and the multi-year appellate fight over the application of Fla. Stat. § 768.79,[8] for this discretion it plainly had. What the Court did not have was any power to refuse an award outright. Nemesis' various arguments as to the propriety of line items in the fee application go to "amount," not to "entitlement," and are therefore entirely beside the point.

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[6] See, Petition, App., 97a – 98a; 108a –109a.

[7] See, Petition, App., 107a, para. 19.

[8] Which would be, at a minimum, in a high multiple of the $4,483 allegedly attributable to drawing the Eleventh Circuit's attention to the new Florida case law, as Nemesis suggests. See, Opposition Brief, pp. 2, 10.

The Eleventh Circuit's refusal to enter a fee award under Fla. Stat. § 768.79 is remediable by mandamus.

In sum, Nemesis is unable to give any coherent, legally justifiable reason for the Eleventh Circuit's refusal to award apellate fees and expenses in *some* amount to Mr. Toto. It is unclear what that Court's reasons were for this order, but the most plausible reason among all those proffered is that the Court believed that it had a discretion in the matter. The only apparent, possible source for such a discretion would appear to be Fed.R.App.P. 39. However, that rule is by its terms subordinate to the law and the law mandates entry of an award. Refusal to enter an award in some amount was therefore clear error, an abuse of discretion and a usurpation of power.

Contrary to Nemesis' assertion at Opposition Brief, pp. 3 – 4, that we agree that this issue could have been addressed on a petition for certiorari, such is far from the case. See, Petition, pp. 18 – 19. Had some reason been given for entry of the order, it is possible that a basis for certiorari would have been disclosed – which may have been other than any of the reasons that the parties have raised here. The order under review did not, however, and does not, seem to fit any of the criteria for review by certiorari under Supreme Court Rule 10, even by analogy. Many circumstances surrounding entry of the order did, and do, however, seem to fit the criteria for mandamus. In this regard we point out that at least one court has held that the failure of a lower court to articulate reasons for the exercise of discretion under a statute, when none clearly appear from the record, leads to a conclusion that the lower court must have acted in error, and that mandamus lies to remedy such. *Executive Software North America*,

Inc. v. United States Dist. Court, 24 F.3d 1545 (9th Cir. 1994). We further note that the Ninth Circuit has consistently held that when the lower court's order raises new and important problems, or issues of law of first impression, as here, that factor weighs in favor of issuance of the writ. See, *San Jose Mercury News v. United States Dist. Court*, 187 F.3d 1096, 1099 (9th Cir. 1999); *Executive Software North America, Inc. v. United States Dist. Court*, 24 F.3d 1545, 1551 (9th Cir. 1994). Indeed, in "supervisory mandamus" cases, involving questions of law of first impression, and therefore of major importance to the administration of the lower courts, as here, a petitioner need only show that the court committed ordinary, as opposed to clear, error. *Calderon v. United States Dist. Court*, 134 F.3d 981, 983 (9th Cir. 1997).

Nemesis' remaining arguments are that this Court lacks the power to enter a fee award when a Circuit Court, mandated by law to do so, refuses to do so; and that the equitable doctrine of laches should prevent the Court from giving the relief requested. See, Opposition Brief, pp. 4, 7. Neither of these contentions are correct or supported by the cases cited. First, this Court plainly has the power to issue a writ of mandamus to direct the Circuit Court to give a reason for any decision which is apparently erroneous or, in default of such, to comply with the law. See generally, cases cited in Petition, pp. 17 – 18.[9] Second, the petition here was filed approximately four months after denial of the motion for reconsideration and for partial recall of the mandate. This is not materially later than the three months which would have been allowed for the filing of a petition for certiorari, unavailable here. The filing of a petition for

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[9] The next step, determining *the amount* of such award, is certainly, initially, a matter for the Circuit Court's discretion.

mandamus is not constrained by any formal time-limits, other than the doctrine of laches. The fundamental issue in laches is whether any prejudice has resulted from the delay in question. As it has been said: "if [the] question is reviewable at all by mandamus, it should be presented with such dispatch and under such circumstances that grievous personal hardship is avoided or minimized." *United States v. Carter*, 270 F.2d 521, 524 (9th Cir. 1959). Nemesis has failed to identify any legal prejudice, let alone "grievous personal hardship" as would bring the doctrine of laches into play and preclude review.

Conclusion

In sum, Nemesis' Opposition Brief does little more than reinforce the fact that there appears to have been no logical, legally permissible reason for the Eleventh Circuit to have acted as it did, and emphasize that mandamus should issue to remedy what appears to have been a clear abuse of discretion and usurpation of power.

Respectfully submitted,

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